UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

PERSONAL AUDIO, LLC	DOCKET 9:09CV111
	JULY 5, 2011
VS.	
	8:29 A.M.
APPLE, INC., ET AL	BEAUMONT, TEXAS

VOLUME 8 OF __, PAGES 2267 THROUGH 2626

REPORTER'S TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE RON CLARK
UNITED STATES DISTRICT JUDGE, AND A JURY

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(REPORTER'S NOTES PERSONAL AUDIO V. APPLE, JURY TRIAL, VOLUME 8, 8:29 A.M., TUESDAY, JULY 5, 2011, BEAUMONT, TEXAS, HON. RON CLARK PRESIDING.)

(OPEN COURT, ALL PARTIES PRESENT, JURY PRESENT.)

THE COURT: Good morning, ladies and gentlemen. Welcome back. I hope you all had a good 4th.

We're continuing now with the cross-examination. Counsel?

MR. HOLDREITH: Yes, sir.

CONTINUED CROSS-EXAMINATION OF STEPHEN WICKER

BY MR. HOLDREITH:

Q. Good morning, Dr. Wicker.

A. Good morning.

Q. Did you have a good weekend?

A. Yes, I did.

Q. Great.

You should have a black binder on your desk with some exhibits that we'll be talking about today. Do you have that in front of you?

A. Yes, I do.

Q. Good. Now, you reviewed source code that runs on iPods in this case?

A. Yes, that's correct.

Q. And I'll just show a slide that you showed during

your direct testimony. This is DDX 404.
You pointed out that -- specifically that you looked at source code, right?
A. Yes, that's right.
Q. And you made a point of it here in your bullet points, right?
A. That's correct.
Q. And you also talked to two Apple employees, Mr. Boettcher and Mr. Wysocki?
A. Yes, that's right.
Q. You asked them about how the iPods operate?
A. That's correct.
Q. And you spent about a week looking at source code down in Houston, right?
A. That's correct.
Q. That was on that locked box we saw?
A. Yes.
Q. And you interviewed Mr. Wysocki and Mr. Boettcher about how the source code works?
A. Yes.
Q. You got to ask them any questions you had?
A. That's correct.
Q. And you had two rounds of meetings with them?
A. That's right.
Q. Now, you looked at source code because it was

important to your analysis to understand how the iPod source code works?
A. That's correct.
Q. And you explained that by studying the iPod source code, you came to a different conclusion from Dr. Almeroth about infringement, right?
A. I don't think I would put it like that. I think we are in general agreement as to how the source code works. It was the conclusions drawn from how that source code works on which we differ.
Q. Exactly. You don't disagree with Dr. Almeroth about how the iPod source code works, do you?
A. I think we're in general agreement. I'd put it that way.
Q. And could you turn, please, in your book to Plaintiff's Exhibit 771A. It's a chart.
A. Okay. I've found it.
Q. And this is an example of a summary of source code that Dr. Almeroth prepared and that you reviewed, right?
A. Yes. This is a claim chart containing his analysis for Gen 3 iPod classic.
Q. And in the right column there is a description of how the iPod source code works.
A. Yes.
Q. And you agree that Dr. Almeroth's summary

accurately describes how parts of the iPod source code works, right?
A. Yes. When he's focusing on how the software actually works, from my recollection we are in general agreement.
Q. All right. And you know that there are summaries for each of the generations of iPods that Dr. Almeroth prepared, right?
A. Yes. That's correct.
Q. And same answer for all of those summaries?
A. (Pausing.)
Q. I mean, you agree with those summaries as to how the source code works?
A. I have not reviewed those summaries in detail so -- I'm assuming, to the extent that they accurately reflect what I've already seen with regard to his analysis of the source code, that they are correct.
Q. Okay. Now, Dr. Wicker, I'd like to talk to you about anticipation and the test that you used to analyze anticipation. Okay?
A. Okay.
Q. And the test you applied when you studied whether iPods infringe is -- I'm sorry. I'm going to start with infringement -- whether they infringe is whether everything in the claim is found in an iPod, right?

A. That's correct.
Q. And for infringement, it's Personal Audio's burden to prove infringement, right, not your burden?
A. That's correct.
Q. And the --
A. That's my understanding.
Q. And the standard of evidence is more likely than not, or preponderance. It has to be more likely than not that everything in the claim is found in an iPod. Is that the standard that you used?
A. Yes, it is.
Q. Now, when you came to the invalidity analysis, there are rules for that, too.
A. Yes. That's right.
Q. And to determine invalidity, again you have to look and see if everything in the claim is found in some piece of prior art for anticipation, right?
A. Yes. That's right. For anticipation --
Q. And if any one thing is missing from that prior art, it's not an anticipation.
A. That's correct.
Q. Now, anticipation means it is the invention; it's exactly the same thing as what's in the claim, right?
A. That's correct. Every single element of the claim is found within one device, one reference, something like

that.
Q. Okay. So, if it's an anticipation, it's the invention.
A. Yes. That's correct.
Q. And the rule for anticipation is you have a higher standard of evidence, right? You have to find clear and convincing proof to find invalidity. Is that the rule you applied?
A. Yes, it is.
Q. And if you are looking at obviousness, if something is not the invention, you still have to have clear and convincing evidence for obviousness. Is that the rule that you applied?
A. Yes, it is.
Q. Now, for invalidity, that's Apple's burden. Do you understand that? Apple has to prove invalidity by clear and convincing evidence. Is that the rule you applied?
A. That's my understanding, yes.
Q. Now, clear and convincing, that's a higher burden for Apple to show invalidity than the burden of a preponderance for Personal Audio to show infringement. Would you agree with that?
A. Yes. It's a higher standard of proof.
Q. Okay. Now, in this case did you read Judge

Clark's definitions of the claims?
A. Yes, his claim construction, I certainly did.
Q. And those definitions include claims that have software algorithms as part of what's required by the claims.
A. That's correct.
Q. Now, in this case you did not look at any source code for the DAD?
A. That's right. That source code was not available.
Q. And you did not look at any source code for the Sound Blaster?
A. That's correct as well.
Q. In fact, you didn't look at any source code for any prior art?
A. Certainly the prior art that I discussed here in court, the source code was not available; and I didn't look at it.
Q. Okay.
A. There may have been other prior art during my investigation where I actually did encounter source code.
Q. For the prior art that you testified about, you did not look at any source code?
A. That's right. It wasn't available.
Q. And it takes a lot of work to look at source code, right?

A. Yes, it definitely does.
Q. Now, Dr. Wicker, did you ask Mr. Novacek to provide source code for you to look at?
A. Yes, I did.
Q. You did? Were you here in court when he testified that you did not?
A. Well, I should be clear. While I was using -- I actually got to do the same thing that he did. I got to operate the equipment; and I did ask to see some sort files, scripts that were used. They weren't the underlying source code that drives all of DAD. They were scripts that put the machines through its paces. That's what I saw, and that's what I asked to see.
Q. I see. So, the source code that actually runs the DAD, you did not ask Mr. Novacek -- you didn't ask him to look at that?
A. That's right. The underlying source code that drove the whole thing was not available.
Q. Well, you didn't ask him for it, right?
A. I can't remember exactly how it went, but I think that's why I didn't ask for it. I knew it wasn't available.
Q. Well, were you here in court when he testified that it was available?
A. It's my understanding that it was in a form that I

couldn't study.
Q. I see. Now, Dr. Wicker, you relied on the DAD manual in this case, right?
A. That's correct.
Q. And I'm showing you now Plaintiff's Exhibit 706. Is this the cover page of the DAD manual you relied on?
A. Yes, it is.
Q. And I'm showing you the one that's marked Plaintiff's Exhibit 706. Are you aware that's the same thing as Defendant's Exhibit 1?
A. Yes. That's correct.
Q. So, when you testified, you used the Defendant's Exhibit 1; but it's the same document, right?
A. Yes. That's my understanding.
Q. And in your report you said you studied this manual.
A. Yes, I did.
Q. And you relied on it.
A. I relied on it, and I cited from it several excerpts.
Q. Okay. Now, this manual is not source code, right?
A. No. This manual is a description of what the source code does. When the source code is loaded onto the machine, the machine behaves in a certain way; and this is the document I used to determine how the machine

would behave.
Q. This tells you how a DAD works, but it doesn't tell you what's in the source code.
A. Well, source code is what makes the machine operate in the way it does; and this is a description of how it operates. So, this isn't literally a listing of the source code. It simply tells us what the source code causes DAD to do.
Q. If you look at one of those iPods and you operate the iPod, you don't know what source code is in it, do you?
A. Simply by operating the iPod, no, you wouldn't know all of the details. You'd know some basic functions. If you wanted to know more of the functionality, you'd have to go to a document like that, but again a document for an iPod as opposed to DAD.
Q. Well, when you studied the iPods to determine infringement, you didn't just look at the user guides. You spent a week looking at source code, right?
A. That's correct.
Q. Now, you were here in court for Mr. Novacek's testimony and his demonstration?
A. Yes.
Q. And -- this is important -- did you hear Mr. Novacek say that the playback_lookahead function --

the playback_lookahead function does not transfer a playlist?

A. Yes. That's correct.

Q. And there's another function that you used called "import," right?

A. That's right.

Q. And you know the import function does not transfer songs, right?

A. That's right. The playlists and the music are separately transferred.

Q. And, Dr. Wicker, are you aware that the DAD needs something called a "library" to function? That's in addition to playlists and songs.

A. A library on a main machine, yes. That's basically the library of cuts, where all the music is stored.

Q. And that's something called the "cuts database file," right?

A. Yes.

Q. That's different from the songs themselves that are stored as individual files.

A. That's correct.

Q. Okay. And you understand that neither function, not playback_lookahead and not import, neither one of those moves the library file?

A. That's correct.

Q. And you know and you heard Mr. Novacek testify that the DAD program can only use a library that's on the same drive that the DAD program is running on, right?

A. I'm not sure that's exactly right. I believe he said that the library could be accessed by the machine -- by any machine that was running the DAD software.

Q. Well, let's take a look at that. I'm going to show you now -- just a moment while I get my place.

Here's what Mr. Novacek said in court. This is Plaintiff's Exhibit 2012; and at page 1971 of the transcript Mr. Novacek was asked, "And DAD can only use the library that's on the same drive as the DAD program. That's just how the program works, right?"

And Mr. Novacek said, "Yes. In regards to the library, that's correct."

Right?

A. Yes, that's right. I think we were saying the same thing slightly differently. What I was trying to say is that a given DAD entity can access its library. There may be multiple DAD entities. There's not just one library.

Q. What this means is if DAD is running on the on-air local machine that has a C drive, it has to have the library on the C drive as well, right, on that on-air

machine?
A. That's correct.
Q. Okay. Now, Dr. Wicker, did you also hear Mr. Novacek testify that he decided it would be best for his DAD machine, this DAD product, to just have a "next" button and not to have separate "skip forward" and "skip back" buttons on the interface?
A. Yes, I did hear him say that.
Q. All right. Now I'd like to talk about the CurrentPlay variable for a minute. That's something that you testified about, right, in context of DAD?
A. That's correct.
Q. And you showed this slide, which is Exhibit 632 -- I should say DDX 632. Is this your slide about the CurrentPlay variable on the DAD?
A. Yes, it is.
Q. And you identified -- now, CurrentPlay variable is something that points to the currently playing song, right?
A. Let's see. The CurrentPlay variable here -- this is actually the -- it says position -- it's kind of hard to see. And what it's pointing to is the next cut that will be played.
Q. Exactly. So, the currently playing song here is the 48 Hours music, right?

A. That's right.
Q. And that's Position Number 1 on the playlist?
A. That's right.
Q. That's the first song.
And what you identified as the CurrentPlay variable is this little string here (indicating) that says "Position Number 2," right next to "playlist is Musicbed," right?
A. That's right.
Q. So, this is pointing to the second position on the playlist, not the first one.
A. At this particular time, yes. But before this was started, it was pointing at this (indicating) particular entry.
Q. Position Number 2 is down here. It's hard to see. I believe that might be the 60 Minutes music.
A. That's what I remember; but I don't think I can read it, either.
Q. It's not important which particular one it is; but in any event, what you identified as the CurrentPlay variable is not pointing to the currently playing song. It's pointing to the song that will play if you hit the "next" button, right?
A. It's actually pointing to the next one that will be retrieved unless you do something like, for example,

move that highlighting to another place and hit "next."

Q. Exactly. But if you hit the "next" button, the DAD is going to go to whatever is in that Position 2 slot, right?

A. If you don't do anything but hit the "next" button, yes, that's exactly right. It will play what's highlighted, which in this case would be the next entry in the playlist.

Q. Now, the "next" button, its function is to go to whatever song the user highlighted, right?

A. That's correct.

Q. So, if the user highlights a song anywhere in the list and hits "next," DAD just goes straight to that song.

A. That's right. You can jump forward. You can jump backward. It depends on where you put the highlighting.

Q. And your testimony is that the "next" button does everything that the claim uses: a first command, a skip forward; a second command to go to the beginning of the current song; a third command to go to the previous song. DAD doesn't have separate buttons for that, right?

A. No. No. It's all been combined in one button. You go to the beginning of the current song if you highlight the current song.

You can skip ahead if you highlight something

that's further ahead in the playlist.
You can skip back if you go backward in the playlist. It's all under the control of one button.
Q. And it's the user who has to tell DAD where to go before hitting the "next" button, right?
A. Yes. Yes. The user will highlight the particular song to which he or she wants to jump.
Q. I'd like to talk about Sound Blaster for a minute. Sound Blaster was a sound card that came with some software, right?
A. That's right.
Q. And this is something that you decided is not the invention in this case. Sound Blaster is not an anticipation.
A. No. It was an obviousness case.
Q. To be clear, we agree that Sound Blaster is not the invention.
A. If by that you mean it doesn't anticipate, that's right.
Q. All right.
A. There were definitely elements missing.
Q. And just to be clear, the sound card, the Sound Blaster sound card and the software, that's not itself an audio player, right? You need to add a computer.
A. The card and its software are designed to be put

in a *Windows 95* system; and, so, once they're installed, you have the player. The card by itself wouldn't function. It's got to have power, or it's got to have connectivity to speakers. There are a lot of things that it has to have before it will actually play.
Q. When you take the sound card -- the Sound Blaster sound card out of the box, it can't do anything. You have to have a computer and install it in a computer, correct?
A. That's right. It will just sit there.
Q. Now, the reason -- or at least one reason you concluded that Sound Blaster is not an anticipation, was not the invention, is because it doesn't have downloadable navigable playlists by itself, right?
A. That's right. For example, there was no downloading just within the Sound Blaster software. You had to go to the *Windows 95* FTP.
Q. Exactly. And were you in court when Mr. Goessling's deposition clip was played?
A. Yes, I was.
Q. And you've studied that deposition testimony?
A. Yes, I have.
Q. Now, Mr. Stephens asked Mr. Goessling some questions about Sound Blaster, right?
A. Yes.

Q. And Mr. Goessling was not given the court's claim construction when Mr. Stephens asked him those questions, right?
A. I think that's right.
Q. And --
A. Yes. I'm sorry. You're right. That's correct.
Q. -- Mr. Goessling had never seen the Sound Blaster document before that day, right?
A. That's correct. That's what he said.
Q. But you had time to study the Sound Blaster documents. You didn't have to just answer off the cuff, reading it right there for the first time.
A. That's right.
Q. You had as much time as you wanted, in fact.
A. Yeah. I felt like I had enough time.
Q. And you did have the court's claim constructions?
A. I did.
Q. And given time to study the Sound Blaster and the court's claim constructions, you concluded it did not have a downloadable navigable playlist by itself?
A. Specifically the downloading element was not present just in the Sound Blaster.
Q. All right. Now let's clarify a little bit what in your opinion is the anticipation in DAD. In your opinion is the DAD manual by itself an anticipation?

A. Yes. During my discussion I showed how every single element could be found in the DAD manual by itself. And just to be clear, every element of the asserted claims.

Q. All right. In your opinion is the DAD system by itself the invention?

A. Yes. Again, every element of the asserted claims can be found in the DAD system, what was actually operated here in court.

Q. But in your opinion the Sound Blaster by itself is not an invention; is that right?

A. There are missing elements. That's correct.

Q. All right. I'd like to ask you now to turn in your book to DDX 751. And I believe the DDX slides are down near the bottom.

A. Yes, sir.

Q. I'll put them on the screen to help you.

A. I'm sorry. You said 751?

Q. Yeah. I'm sorry. These were renumbered in court; so, I have the old number in my outline. It's actually DDX 708. I'll put it on the screen so you can see what it looks like.

A. I've found it. Thank you, sir.

Q. Do you have DDX 708?

A. Is it the old jukeboxes?

Q. It is the old jukeboxes. Exactly.
A. Yes, I've got that.
Q. Now, jukeboxes are not the invention, right?
A. No. No, they're not. The point was more that playlists were well-known.
Q. But jukeboxes didn't have downloadable navigable playlists, right?
A. No. They did have playlists, but I did not investigate whether they could actually download.
Q. You also talked about a Sony Discman, right? I think it was Defendant's Exhibit 23 or 32. Do you recall that? You had an actual real example.
A. Oh, yes. It's still here. It's Defendant's Exhibit 32.
Q. All right. You're holding in your hands a Sony Discman, Defendant's Exhibit 32?
A. That's correct.
Q. That is not the invention?
A. No. No, it's not, in the sense that there are elements missing.
Q. And that does not have downloadable navigable playlists, right?
A. More specifically, you can't download a playlist just with this device.
Q. And that was made by Sony around the time of the

invention in this case, right?
A. I think it was a year or two earlier. We discovered last time the writing was really small but -- let's see. 1993, so, it's a few years earlier; but it's in the same decade.
Q. Now, were you in the courtroom when Tony Fadell testified that Sony was the leader and the 800-pound gorilla in this portable audio player space?
A. Yes. At that time the Discman was it. A lot of people had them. They were selling really well. There were lots of versions on the market. And they also had cassette players. That's not at issue here, but they had a lot of handheld devices that were dominating the market.
Q. But what they did not have was a player with a downloadable navigable playlist, right?
A. They certainly had playlists that could be navigated; but to the best of my recollection, you could not download a playlist onto these devices. You had to either type it in or create it yourself on the device.
Q. Now, you also talked about an article by Loeb.
A. Yes.
Q. Now, to be clear, Loeb is also not the invention, right?
A. That would be the ACM communications article by

Shoshana Loeb on LyricTime. No, it does not anticipate the asserted claims.

Q. All right. I'd like to turn now, Dr. Wicker, to a couple of Apple licenses that you talked about. All right? Do you recall that?

A. Yes, I do.

Q. Now, the licenses include, for example, a license -- I apologize, Dr. Wicker. Because of the slide renumbering that happened during court, my slide numbers are off. So, if you'd turn in your book to Exhibit DDX 720, that should be the correct slide. Do you have that?

A. The one that says "Comparable Apple Patent Licenses" is 718. Is that what you're referring to?

Q. No. Actually -- I'm actually looking at DDX 720. It just says the "Digeo '823 Patent."

A. Yes.

Q. Do you have that?

A. Yes, I do.

Q. Great. And that's up on the screen now.

MR. HOLDREITH: Thank you, Jeff.

BY MR. HOLDREITH:

Q. This is one of the patents that was in the licenses that you talked about, right?

A. That's right.

Q. And another one that you talked about is the Digeo '891 patent on DDX 721; is that right?
A. That's correct.
Q. And you talked about another patent license that related to an E-Data patent; is that right?
A. That's correct.
Q. That's Slide Number DDX 719.
A. Yes.
Q. Okay. Now, you did not talk to anyone at Apple about these licenses before you reached your conclusions in this case, right?
A. Not that I recall. I studied the licenses and the patents myself and came to my own conclusions. I don't remember discussing them with Apple employees.
Q. And you don't know if Apple used these patents, the Digeo and the E-Data patents, in any Apple product, right?
A. That's right. I don't know one way or another.
Q. And if Apple does happen to use any of these patents in its products, you don't know when or how often or which products?
A. That's correct.
Q. And you don't know what value Apple places on these Digeo and E-Data patents, right?
A. Actually I do. If you'll go to the previous

slide, you'll see that -- that would be Defendant's Exhibit 718 -- you'll see that Apple paid $500,000 in lump sum for the E-Data agreement and 1.75 million as a lump sum for the Digeo agreement.

Q. Dr. Wicker, didn't you tell my colleague at your deposition that you don't know what value Apple places on these patents?

A. I know that they paid half a million for one and 1.75 for the other; so, that would tend to lend me to believe that's what they valued those patents at.

Q. In the back of your binder, there is a deposition transcript. Could you turn to page 220, please?

A. 220 of the deposition transcript itself?

Q. Right. It's the internal numbering and the reporter pages. 220. Are you with me?

A. Yes.

Q. And I'm going to read at line 12 -- now, I have a question for you before I read that.

You had already studied these patents and the licenses at the time you gave your deposition testimony, right?

A. That's correct.

Q. Okay. And the question at line 12 was, "I assume you also wouldn't know what value Apple places on these patents that you have here in your report?"

And your answer at line 15 was, "No, I don't know that."

Did I read that right?

A. Yes, you did.

Q. Now, since then, you've been talking to Apple's lawyers, right?

A. No. No. You've left out a little bit. If you'll read the previous question and answer, you'll find I was talking about whether or not they were used. I don't know if Apple got a good deal when they paid 1.75 and half a million. I simply know what they paid. This context was simply do they use it now, do they find it valuable now? I don't know. But I do know what they paid for it.

Q. Fair enough.

Now, you don't know whether these E-Data or Digeo patents are valid, do you?

A. I didn't conduct that analysis; so, I can't say.

Q. And you don't know if they're infringed.

A. Again, I don't know. I haven't compared them to any existing products.

Q. And when Apple sat down to negotiate these licenses, you don't know if Apple sat down at the table and said, "You know, these are valid patents. We're infringing them, and we need a license?"

A. I certainly don't know whether they felt that way or not.

Q. I'd like to turn now, Dr. Wicker, to the question of some of the technology that's in the iPods that you talked about that corresponds -- or that is accused of corresponding to the structure that Judge Clark defined. All right?

A. Okay.

Q. And the first thing I want to ask you about is NAND flash storage. Okay?

NAND flash storage is something that's used in the iPod nanos, right?

A. That's correct.

Q. And NAND flash, as it's used in iPods, is persistent mass storage. Would you agree with that?

A. Yes. That's right. It's the same technology that's used in thumb drives, the little things that you can now plug into a USB port and store huge amounts.

Q. Just to be clear, though, you agree that NAND flash is persistent mass storage?

A. Yes. Yes, definitely.

Q. Now, is it your view that Judge Clark's construction requires that the mass storage be a hard drive as opposed to NAND flash?

A. No.

Q. All right. So, you agree that the NAND flash in the iPod nanos is persistent mass storage as defined by Judge Clark, right?
A. It is persistent mass storage. But again, as we've discussed, it's not equivalent to magnetic disk memory for the reasons we talked about.
Q. Well, do you think, Dr. Wicker -- and I'm showing you now Plaintiff's Exhibit 1033 -- it's the definition of the corresponding structure for "means for storing a plurality of program segments," right?
A. That's right.
Q. Do you think this says that the persistent mass storage device has to be a magnetic disk memory or an equivalent?
A. No. It simply says "such as a magnetic disk memory."
Q. Right. So, a persistent mass storage device, which is a NAND flash, it satisfies this definition whether it's like a magnetic disk memory or not, doesn't it?
A. It is persistent; but at the time the patent was issued, it was not "like" a magnetic disk memory. It was not "such as" a magnetic disk memory. In fact, that was discussed by both Mr. Fadell and myself. It was too expensive.

Q. That's the definition you applied when you rendered your opinions in this case?
A. I applied the court's definition.
Q. And you understood -- and you're interpreting the court's definition to say the persistent mass storage has to be like a magnetic disk memory?
A. "Such as a magnetic disk memory." That's right.
Q. So, is it your opinion that if you have NAND flash, which is persistent mass storage, it does not satisfy this definition?
A. That's correct.
Q. Dr. Wicker, I want to talk to you about USB now for a minute. The iPods, many of them use USB 2.0 for a connection, right?
A. That's correct.
THE COURT: Excuse me.
Ladies and gentlemen, it's a little bit early; but we're going to take a break. I'm going to ask you to step on out to the jury room, please.
(The jury exits the courtroom, 9:04 a.m.)
THE COURT: Would you please step out of the courtroom for a minute?
THE WITNESS: Yes, sir.
(Witness exits the courtroom.)
THE COURT: All right. Are we into a claim

construction problem here?

MR. HOLDREITH: I don't think so, your Honor. The court made the construction perfectly clear. I think he's disagreeing with your construction.

THE COURT: Well, that is a claim construction problem; and that's what I'm concerned about. I'm trying to follow what's happening here, but an expert can't disagree with the court's claim construction. I mean, you can get a higher court to disagree and that's fine, but the witnesses can't. And that's what I don't want to get involved in is arguments to the jury about claim construction.

So, let me -- Mr. Cordell, I'm not sure...

MR. CORDELL: Your Honor, we certainly don't mean to have Dr. Wicker challenge the court's claim construction. I think his point is actually pretty narrow on this. I think it is simply this, that at the time that the patent was issued, at the time these claims were to be interpreted, one of ordinary skill didn't consider flash memory to be a persistent mass storage device in this context. He's not disagreeing with the court's claim construction. It's just that.

And then to put a more forceful point on it, the example given in the claim construction shows that -- the differences that he's relying on.

Again, we're not -- this is not our primary defense by any stretch, and I don't think that he -- I think what you just heard is that he readily admits that today flash memory is considered to be persistent mass storage. So, you have the factual predicate for plaintiffs to argue whatever they want to argue about that; and we have factual predicate to argue whatever we will. Again, I don't think it's a huge point; and he certainly does not mean to contest the court's claim construction on that in any way, shape, or form.

THE COURT: So, just to be clear, what he's saying is that in 2001 flash -- NAND flash is not considered the same or is not a structural equivalent to a disk.

MR. CORDELL: Correct.

THE COURT: All right. Well, that's -- okay. That's what he said. I guess he can be entitled -- now I'll get back to my original question to Personal Audio. That is the definition. That is the proper date. You look at the date the patent is issued.

So, I'll get back to my original question. Are we talking about a problem of claim construction or a problem of he's saying as of the date of patent issuance, that just simply isn't a structural equivalent.

MR. HOLDREITH: To be directly responsive, your Honor, I think the construction says it has to be a persistent mass storage; and it gives a hard disk as an example. So, the correct structure to measure from is persistent mass storage, not a hard drive. And I believe the court made that comment earlier during JMOLs.

MR. CORDELL: And, your Honor, Dr. Wicker said quite clearly that today persistent mass storage includes flash but at that time it did not; and he's entitled to that opinion. I mean, it's the testimony from --

THE COURT: Okay. So, he's saying that in 2001 NAND was not considered persistent mass storage.

MR. CORDELL: Correct. Correct. As echoed by Mr. Fadell who said there was no way they could have made a device out of flash because I think the testimony was that it cost over $3,000 just for the --

THE COURT: Okay. All right. All right. Let's bring the witness back in, and please bring the jury back in.

(The witness enters the courtroom.)

THE COURT: All right. Just for the record, I conclude that we're not really talking about claim construction; we're talking about what may wind up being a factual dispute as to what the device was at the time or as of the time the patent was issued. And that may have to be fought out between the parties and the witnesses.

MR. CORDELL: I understand, your Honor. Thank you.

(The jury enters the courtroom, 9:14 a.m.)

THE COURT: All right. Ladies and gentlemen, there was a legal issue that I thought was being brought up; and it is not. It's just something I have to be careful about; so, we'll just continue on.

Again, please remember your instructions. Nothing I say or do should indicate to you that I have an opinion on the facts one way or the other; but kind of like an umpire or referee, I have to be very careful about the rules. It turns out that that's not going to be a problem here; so, we'll just go along.

Go ahead, counsel.

MR. HOLDREITH: Thank you, your Honor.

BY MR. HOLDREITH:

Q. Dr. Wicker, I guess I just have one follow-up question about NAND flash, then. NAND flash was available technology for persistent mass storage in 2001. It's just your opinion it was very expensive?

A. Yes.

Q. All right.

A. That's correct.

Q. Now I'd like to talk to you about USB. USB 2.0 is

a standard that Apple uses for connecting iPods to computers, right?
A. That's correct.
Q. And looking now at Plaintiff's Exhibit 348, this is a document you reviewed, the universal serial bus specification?
A. Yes. That's correct.
Q. And this is the specification for USB 2.0, right?
A. That is right.
Q. And that was available in April, 2000?
A. Yes, that's correct.
Q. So, by March of 2001, when the '076 patent issued, USB 2.0 was available?
A. Yes, it was.
Q. The processors that are used in iPods are System-on-Chips, right?
A. Yes. I think that's a fair description.
Q. And System-on-Chips for audio players were available by March of 2001, right?
A. If by "audio players" you mean more generally, for example, large players, yes. There were audio chips for large devices.
Q. Let's take a look at Plaintiff's Exhibit 759. This is a specification or a description of a Cirrus Logic System-on-Chip for an ultra-low-power audio

decoder, right?
A. Yes. That's right.
Q. That's what the title says.
A. Yes, that's right.
Q. Ultra-low-power is something that's useful in portable, mobile applications, right?
A. That's right. Typically when there is a battery involved, one looks for low-power chips.
Q. And so, this is a description of a System-on-Chip for a mobile audio player that was available in March of 2001, right?
A. If I remember Mr. Fadell's testimony, one of the problems he had with this chip was that they weren't delivering what they were promising. This sheet may be dated 2001, but I'm not clear that the devices were actually available.
Q. Well, that was in reference to the 7409, right?
A. I think you're right. That's correct.
Q. And this is the 7209.
A. That's right. This is the earlier version.
Q. So, that was available in March of 2001.
A. Yes, that's right.
Q. And you were talking about this sheet; but to be clear, this Plaintiff's Exhibit 759 is a very long, multipage document. It runs over a hundred pages.

A. That's right. The front page is often referred to in that form as a "data sheet."
Q. All right.
A. That's its jargon.
Q. I'd like to discuss now, Dr. Wicker, the IR link that has come up in your testimony, right?
A. Yes.
Q. And that's related to the court's claim construction as the means for receiving, correct?
A. That's right. It's one of the two structures in the fourth element, the list of overall structures that the court found.
Q. You're referring to Element Number 4 here on Plaintiff's Demonstrative Exhibit 1027, the construction of "the means for receiving"?
A. Yes, that's correct.
Q. Now, you showed -- and I hope the slide numbering is ironed out, yes -- Defendant's Demonstrative Exhibit 449 to illustrate your opinion that the iPod does not have structural equivalent to that IR link, right?
A. That's correct.
Q. And what you showed here is an example from the patent where you could have a player in your car and an infrared link to a local communications server that's linked to the Internet that's linked to another server,

right?
A. Yes. That's correct.
Q. Now, for the means for receiving -- including that Number 4, the IR link -- the Internet is not part of the structure that's required for the player, right?
A. Would you mind going back, then, to the previous slide? Because I'm not sure I entirely agree.
Q. You want to see the construction again?
A. Yes, please.
Q. Sure. Here it is.
A. "Means for receiving and storing a file of data establishing a sequence."
"A radio or infrared link for connecting to a local communications server computer linked to the Internet." So, I would suggest that "linked to the Internet" is actually part of the construction here.
Q. What you have to have on the player is a link for connecting, right?
A. That's right, a radio or infrared link that will allow you to connect to a local communications server that is linked to the Internet.
Q. Right. So, the Internet is not part of the structure of the claimed player, right?
A. The Internet is not part of the player. The infrared link that connects you to the Internet is part

of the player --
Q. Exactly.
A. -- that's claimed.
Q. The player has to have a link.
A. That's right.
Q. But the player doesn't have to have the Internet.
A. The player doesn't have to have the Internet, but the infrared link must be for connecting to a server that is linked to the Internet.
Q. Exactly.
And the local communications computer is not part of the structure of the claimed player, right?
A. It's not part of -- oh, I'm sorry. It's not part of the player, no. The player contains a link that connects to the server, but the server is not part of the player.
Q. Right.
A. In fact, that's why you have the link, so you can connect the player to the server.
Q. Exactly. And obviously the car is not part of the structure. You're not suggesting that there has to be a car here to find infringement.
A. No. The car comes up when one looks at how the patent describes this infrared link. The only discussion of an infrared link is in the context of connecting your

car to a server in your garage.
Q. Are you sure about that?
A. It mentions IrDA and it says IrDA has lots of applications, but in an actual embodiment using infrared, yes.
Q. All right. Well, maybe we'll come back to that.
Now, you know, sir, that iPods are specifically programmed and set up to get content over the Internet through your local computer, right?
A. No. No. IPods are designed to connect to a computer running *iTunes*.
Q. Did you consider, as one of the documents you looked at in this case, the iPod classic user guide? Here is Plaintiff's Exhibit 101.
A. Yes.
Q. Did you read page 1, which is Plaintiff's Exhibit 101, at page 4?
A. Can you blow that up, please?
Q. Sure.
A. Thank you. That's much better.
Yes.
Q. All right. And on page 1 of the iPod user guide, Plaintiff's Exhibit 101, page 4 -- there is a table of contents. That's why it's page 4 in the exhibit.
A. That's fine.

Q. It says, "To use iPod classic, you put music" -- among other things -- "on your computer and then add them to the iPod classic," right?
A. Yes. That's right.
Q. So, that says you have a link to your local computer. That's one thing you need, right?
A. That's correct.
Q. And it also says that you should (reading) listen to podcasts and downloadable audio delivered over the Internet, right?
A. That's right.
Q. And it's explaining you can get songs and podcasts from the Internet to your local computer and then put them on your iPod, right?
A. That's right.
Q. And that's what the link on the iPod, the communications port, is for?
A. No. No. What the communications port is for is for taking whatever is on this computer and putting it onto the iPod. The iPod has absolutely no capability of somehow accessing the Internet and requesting a download as described in the patent.
Q. All right. Here's another page, page 17 of the user guide. It's Plaintiff's Exhibit 101 at page 17. This page says here are ways to set up your *iTunes*

library on your local computer, right?
A. Yes, that's right.
Q. And it says "To listen to music on iPod classic" -- that's the iPod, right? Is iPod classic --
A. Oh, I'm sorry. I agree.
MR. ELACQUA: Your Honor, objection. I believe this goes into setting up *iTunes* and even down below, the *iTunes* Store. We would object on that basis.
THE COURT: Overruled. I think based on his testimony on direct and on cross, this is opened up.
Go ahead, counsel.
BY MR. HOLDREITH:
Q. Dr. Wicker, it says (reading) to listen to music on your iPod, you first need to get that music into *iTunes* on your computer, right?
A. That's right.
Q. And then it explains some ways to get that music onto your computer, right?
A. That's correct.
Q. And it says one way you can do it is to purchase music on download podcasts online from the *iTunes* Store, right?
A. That's right.
Q. And you do that over the Internet.
A. That's right.

Q. And, in fact, it even tells you "if you have an Internet connection, you can easily purchase and download songs," right?
A. Yes, that's correct.
Q. And then if we look at page 11 of the user's guide, which is Plaintiff's Exhibit 101 at 11, this explains how to connect your iPod to your local computer using that USB port, right?
A. That's right.
Q. And this is how you get the music and the podcasts from the Internet onto your iPod.
A. That's right. Whatever is on your computer running *iTunes*, you can get it onto the iPod when you synchronize.
Q. It says, "By default, *iTunes* syncs songs on iPod classic automatically when you connect it to your computer." Is that what it says?
A. That's right, yes.
Q. Dr. Wicker, are you aware that the iPod when it comes out of the box from Apple, that it has source code that classifies purchased items that have come from the *iTunes* Store?
A. It does have software that has the capability of identifying or labelling a particular song as either purchased from the *iTunes* Store or otherwise, in other

words, not purchased. It could come from a CD or something like that.
Q. So, when the iPod leaves Apple's factory, there's already source code on it that says, "Hey, if you get a purchased song that came from the Internet, here's how you classify it," right?
A. Right. And just so I'm clear, to purchase songs, you'd have to purchase songs from a computer running *iTunes* and then download that song onto the iPod. You can't purchase songs from an iPod.
Q. Exactly. You need a local computer that connects to the Internet, right?
A. Right. You cannot connect directly through a server to the Internet using your iPod.
Q. Let me talk to you about the term "fetching" for a minute. Okay? You know that there are some claims that talk about an audio player fetching and playing songs.
A. Yes.
Q. And do you dispute that iPods have structure that fetches and plays songs?
A. What the iPod does is it has the ability to load audio into RAM. Once in RAM, that audio can be played if it comes up -- if a user selects it, if it comes up on a playlist. And, so, I agree to the extent that yes, you can fetch music, take it off the hard drive, for example,

every 20 minutes if you're playing a long playlist, load it into RAM, and then at the appropriate time it will be played.

Q. But you're not contesting that -- the part of the structure that the accused products fetch and play audio program segments. That's present, right?

A. An iPod can certainly fetch and play audio segments, yes.

Q. And specifically that part of the structure in the claims, which is fetching and playing audio program segments, that's in the iPod. You would agree with that?

A. One can fetch and play audio segments using an iPod.

Q. I'd like to talk to you now about the element of the controls, the input means.

A. Yes.

Q. And, Dr. Wicker, you say that the iPod buttons are not equivalent to the structure which is the input means, right?

A. That's correct.

Q. Let me just catch up to my place here.

In fact, you showed a slide -- this one, DDX 457 -- to illustrate that point, right?

A. That's right.

Q. And what you were saying is you think that the

structure that's required is a keyboard, right?
A. I believe I'm actually quoting from the court's claim construction. The court has identified a keyboard as being a structure that implements the appropriate function.
Q. And what you showed here is a QWERTY keyboard like you'd use on a computer to write email?
A. Yes.
Q. And --
A. A standard keyboard.
Q. And the quote you have from Dr. Almeroth here is, "In your opinion, in 2001 to somebody skilled in this art, the four buttons on the iPod are a structure which is identical or equivalent to a keyboard as defined here," right?
A. Yes.
Q. And are you saying that the definition he was referring to is a QWERTY keyboard with all of the alphabet keys?
A. I believe the definition there -- it's a reference to the claim construction, not to a keyboard or a particular definition for a keyboard.
Q. Were you in court when Dr. Almeroth gave that testimony?
A. Yes, I was.

Q. Do you recall that he referred to the IEEE dictionary?
A. Yes.
Q. Do you recall that he referred to a definition which is a "choice device"?
A. That's right.
Q. And this is Plaintiff's Exhibit 767 at page 11; and it says, "A typical physical device is a function keyboard or a set of function keys" and a synonym is a "button device," right?
A. That's right.
Q. Isn't that the definition Dr. Almeroth was referring to?
A. Thank you for reminding me. Yes. It was the definition for "choice device" as opposed to a definition for a "keyboard."
Q. So, it wasn't a QWERTY keyboard, right?
A. The keyboards that have been referred to are QWERTY or similar keyboards.
With regards to this choice device, I'm not sure why he chose this particular word to look up as opposed to keyboard. But the choice device is a more general term that could include a keyboard or a set of function keys. I certainly agree with that definition.
Q. I'd like to turn now, Dr. Wicker, to your

discussion of something called the "LocType variable." Okay? And you showed Figure 5 of the patent here. I'm showing it from the '076 patent, and it happens to be Plaintiff's Exhibit 1 at page 7. This is a figure that you talked about, right?

A. Yes. That's right.

Q. And you would agree that it's a valid playlist under the patent if all of the records in the playlist are P-type programs, right?

A. When you say "valid," you mean that it has Selection_Records that include both LocTypes and ProgramIDs?

Q. Right.

A. Yes. So long as the Selection_Record and the LocType is there, then it satisfies the definition for "Selection_Record."

Q. So, this example playlist could be made up entirely of just the letter P and a ProgramID, a whole bunch of those in series, right?

A. Yes. It would still have the LocType and the ProgramID.

Q. Could you turn, please, to Plaintiff's Exhibit 1074 in your book?

A. PX 1074?

Q. Right.

A. I don't have that.

THE COURT: I don't, either.

MR. HOLDREITH: I apologize, your Honor.

THE COURT: Just put it up on the screen.

MR. HOLDREITH: Well, I think there is an objection to it. I need to lay a little bit of foundation.

THE COURT: All right.

Ladies and gentlemen, we're going to go ahead and take a break. I will ask you to be back at ten of.

(The jury exits the courtroom, 9:34 a.m.)

THE COURT: All right. We'll be in recess until ten of.

(Recess, 9:35 a.m. to 9:51 a.m.)

(Open court, all parties present, jury present.)

THE COURT: Go ahead, counsel.

MR. HOLDREITH: Thank you, your Honor.

BY MR. HOLDREITH:

Q. Dr. Wicker, I apologize. During the break we were able to distribute a copy of that 1074. Do you have a copy of that now?

A. Yes, I do.

Q. Let me direct your attention to the screen first. This is from a patent still, Plaintiff's Exhibit 1, at page 7. A ProgramID could refer, for example, to a song, right?

A. That's correct.

Q. P-type record could be a song?

MR. ELACQUA: Your Honor, this Exhibit 1074 -- if you're putting it up there, we have an objection under Rule 403 that it would be confusing because it's made to look like something that's not in the patent.

THE COURT: Okay. Well, it's not up there yet.

MR. HOLDREITH: It's not up there yet.

THE COURT: All right.

MR. HOLDREITH: I'll get there in a second.

THE COURT: Let's see how he tries to get there and then go ahead and make your objection.

MR. ELACQUA: Thank you, your Honor.

BY MR. HOLDREITH:

Q. So, Doctor, I think the question I had asked you is that this playlist, in accordance with the patent, it could be made up of all P records and ProgramIDs, so all songs. That would be a valid playlist, right?

A. If it just had ProgramIDs with P LocTypes, would it be a valid sequence file?

Q. Right.

A. No. There still wouldn't be the R record at the

end and at the beginning. In other words, it wouldn't do continuous play. So, if you mean "valid" as in satisfying the claim limitations, it wouldn't perform continuous play.
Q. Well, let me rephrase that question a little bit.
There's no requirement for the playlist to have any other LocType than a P LocType with ProgramIDs, right?
A. Well, again, if you want it to perform continuous play, it can't just have Ps; it's got to have Rs on the ends. Otherwise, it won't perform continuous play.
If you mean would it still be a sequence file even though it didn't satisfy all of the claim limitations, yes.
Q. And I'm not sure if you're disagreeing with me. Can you look at page 91 of your deposition transcript, please?
A. Okay. I'm there.
Q. And starting at line 11, you were asked, "I was just trying to establish that one could create a sequencing file in accordance with the specification here with just one LocType, P, for programming segment, right?"
And then at line 16 you said, "Yes. But the capability would remain to distinguish between different

LocTypes and other playlists."

Did I read that correctly?

A. I think you did. The key, of course, is in accordance with the specification; and you were asking me about valid. So, by "valid" I thought you meant satisfying claim limitations. You can do things according to the specification and still not satisfy the claim limitations. That was -- that's the only point.

Q. All right. Now, could you look at Exhibit 1074?

THE COURT: Wait. Do you have an objection now?

MR. ELACQUA: Yes, your Honor. This Exhibit 1074 is -- under Rule 403 it is confusing and misleading because it is meant to look like something that's in the patent and which it's not.

THE COURT: Okay. I think that could be handled by the witness and, if necessary, by questions from you about it if necessary. I think the jury can understand that based on what the witness and lawyer are saying. So, I will overrule that.

BY MR. HOLDREITH:

Q. Dr. Wicker, now, 1074 is not a figure from the patent. I want to be clear about that. This is just an illustration of what a sequence might look like if it just had P records that are ProgramIDs. Are you with me?

A. Yes.
Q. And in this example what you have is a sequence which is all, for example, songs, right? Is that right?
A. We can certainly assume that. All those ProgramIDs can be songs.
Q. And that is in accordance with the description in the specification, right?
A. Yes -- well, the fact that a ProgramID could be a song is in accordance with the specification.
Q. And the fact that a sequence could be all songs.
A. Yes. That's correct.
Q. Now, I want to ask you a little bit about how you did your construction and what rules you followed when you were considering whether an algorithm was equivalent structure. Okay? I'm showing you now Plaintiff's Exhibit 1040. It's the construction of the "means responsive to said first command" limitation in the '076 claim 1. Okay?
A. Okay.
Q. And the algorithm here has three steps, right?
A. Yes.
Q. Now, for purposes of evaluating whether an algorithm is equivalent, do you understand that you could have a different number of steps and still be equivalent?
A. So long as those three steps are performed, there

can be equivalents.
Q. You can do it with two steps, for example, as long as you were doing the equivalent thing.
A. Oh, I see. So, you're asking perhaps I could combine 1 and 2 to have a single step that did both?
Q. For example.
A. It's my understanding that so long as all three steps are somehow performed, then you -- there is either a possibility of identical structure or equivalents.
Q. Even if someone could figure out how to do it in one step, that could still be equivalent?
A. I haven't thought about whether that's possible; but if it is, then yes, that's my understanding.
Q. And the variable names -- you don't have to have the identical variable names, right? You could call the Selection_Record something else.
A. That's correct. It's the structure, not the name of the structure, that's important.
Q. All right. Now I'd like to ask you about the comparison between the IR link, the infrared link, in the court's claim construction and the USB connection in the iPod. Are you with me?
A. Yes.
Q. And your view is that there are substantial differences between using an infrared link and using a

USB connection, correct?
A. That's correct.
Q. All right. So, let's explore that.
There are some similarities between an infrared link and a USB link. Would you agree with that?
A. Yes. For example, they are both data communication technologies. You can send bits over either one.
Q. Exactly. Let's go through some of those. So, they're both point-to-point connections, right?
A. Yes.
Q. And both IR and USB allow direct connection between pairs of devices, right?
A. Yes. They allow for point-to-point connections between devices. That's correct.
Q. So, you can use both to connect a handheld player device to a computer, for example, right?
A. Yes.
Q. And they are both usable for transferring data between those two devices, right?
A. Yes, both IR and -- IrDA, in particular, and USB will allow for the transport of data between two points.
Q. And when you say "IrDA," you're referring to I-r-D-A?
A. Yes. That's correct.

Q. And that means the infrared data standard?
A. Yes.
Q. And they are both -- IR, or IrDA, and USB, they are both standard transmission protocols, right?
A. Both IrDA and USB are standardized. That's right.
Q. And they are both for use over relatively short distances, right?
A. I think IrDA might actually go a little longer, but distance is everything being relative. So, we're in the 5- to 10-, 20-feet range for IrDA; and USB tends to be a little shorter. I can't remember its maximum run length, but it's a few feet.
Q. All right. Now, Dr. Wicker, there is in the patent specification in this case a discussion of using IrDA with a PDA, right?
A. Yes.
Q. And I'm showing you Plaintiff's Exhibit 1. That's the patent, right?
A. Yes. That's right.
Q. If we go to page 13, there is an example here or discussion in Column 7 at line 53 -- I'm just going to blow that up.
This talks about IrDA, what you call "IrDA."
A. Yes, right in the middle where it says, "The infrared Data Association's (IrDA) wireless infrared (IR)

standard.
Q. And it talks about using IR as a "pathway rapidly becoming a standard feature in all notebook computers and PDAs," right?
A. That's right.
Q. And in 2001 it was known that you could sync a PDA with a computer using IR, right?
A. Yes. That's correct.
Q. Now, you, yourself, have not -- or at least at the time you formed your opinions in this case -- had not done IR syncing. You had not used that standard.
A. Let me be careful. When we talk about syncing a PDA, this isn't music syncing. Just so I'm clear, it's syncing data, for example, a calendar, relatively small files, in fact, significantly smaller than music files.
And to get to your question, I had PDAs and notebook computers. In fact, I think I did have a notebook computer that had IR capability; but I didn't use IR to sync my PDA. I put it in a cradle to cause it to synchronize. So, it was a wired connection.
Q. So, to be clear, you, yourself, never used that IR connection, right?
A. Well, I never used IR for my PDA that I can recall, no.
Q. And you haven't studied it; and you don't know the

details of that IR sync, right?
A. I certainly have studied IrDA. I am not as familiar with exactly how, for example, the PalmPilot in 2001 used IR to perform synchronization.
Q. Exactly. You haven't studied IR being used to sync, and you don't know the details of it.
A. Well, again, if it's using IrDA, I know a fair amount about it; but I did not study my PalmPilot -- I should say I didn't use the IR capability of the PalmPilot.
Q. You're not saying that you know how the IR sync was used with a PDA or the details of how it operated, are you?
A. No. To find out the details of how a PalmPilot used its IR to sync, I'd have to get in deep and study it, look at the software, et cetera.
Q. Now, Dr. Wicker, let's talk a little bit more about this comparison. One of the things that you referenced in your testimony is a patent that Apple has on using the scroll wheel, right?
A. That's correct.
Q. And that's Defendant's Exhibit 199?
A. Yes. That's correct.
Q. And this patent is something that you relied on?
A. Yes.

Q. Now, this Apple patent was filed in 2001, right?
A. Yes.
Q. And that's, oh, about four or five years after the patents in this case were filed in 1996.
A. That's correct.
Q. And this patent is assigned to Apple, right?
A. Yes.
Q. And it shows, here on the cover, something that looks a whole lot like an iPod.
A. Yes, that's right.
Q. Now, you concluded this is an important Apple patent in this case, right?
A. Yes. It informed me that the scroll wheel itself was sufficiently innovative that patent protection was applied for.
Q. Exactly. This is a patent on a scroll wheel, right, not a patent on the whole iPod?
A. That's right. It's just one small piece of the iPod. I think if you'll highlight the title, that will make that point clear.
Q. The title is "Method and Apparatus for Accelerated Scrolling."
A. That's right.
Q. Okay. Now, you would agree that the patent appears to show somebody, in Figure 9, using an iPod

scroll wheel, right?
A. Yes.
Q. And in Figure 7B there is something that looks a whole lot like an iPod.
A. That's correct.
Q. And you understand the identification system in patents. This is -- Number 700 refers to this whole player here (indicating), right?
A. Yes.
Q. Now, I'm going to show you Column 10 of Defendant's Exhibit 199. Do you remember what the number was that referred to the player?
A. That's not fair.
Q. 700.
A. I can't remember. 700. Okay.
Q. Right?
Now, you know that when you file a patent in the Patent Office, you sign an oath that what you're saying is true, right?
A. Yes.
Q. So, when Apple filed this patent, they were certifying to the United States Government that what's in the patent is true?
A. That's correct -- or that's my understanding.
Q. And if we look at Column 10, which is Defendant's

Exhibit 199 at page 25, there is some discussion of the player 700, right?
A. (Pausing.)
Q. Are you with me?
A. I'm reading through it real fast. Sorry.
Yes. I see that.
Q. And what this says -- what Apple said to the government and the public is, "The media player 700" --
That's the iPod, right?
A. Yes.
Q. -- "typically has connection capabilities that allow a user to upload and download data to and from a host device such as a general purpose computer." Did I read that right?
A. Yes.
Q. And then a little further down they say, "In one embodiment, the media player 700 can be a pocket-sized handheld MP3 music player that allows a user to store a large collection of music." With me so far?
A. Yes.
Q. Now, going back to that figure, 7B, there is something here called "718," right?
A. Yes.
Q. And you know what that is?
A. Looks like a FireWire port.

Q. That's the port for connecting the iPod to the computer, right?
A. Yes.
Q. And let's remember the number this time. It's 718.
A. Thank you.
Q. If we go to Column 12 of the patent, there is some discussion at about line 21. I'll blow it up for you. And what Apple said here to the government and to the public is that (reading) the media player 700 may also include a power switch, a headphone jack, and a data port 718, right?
A. Yes.
Q. And that is the port on iPods for connecting iPods to computers, right?
A. Yes. If we assume that the iPod 700 -- excuse me -- the media player 700 is, in this particular instance, an iPod -- it certainly looks like one -- then that data port 718 would be the FireWire port.
Q. And it says here, "The data port is capable of receiving a data connector/cable assembly configured for transmitting and receiving data to and from a host device, such as a general purpose computer," right?
A. That's correct.
Q. Now, your opinion is that infrared and USB are not

interchangeable ways to get data to and from an iPod, right?
A. That's correct.
Q. In the patent, what Apple said to the public and the government is you can use that data port "to upload or download songs to and from the media device," right?
A. That's correct.
Q. And it said, "The data port may be widely varied," right?
A. Yes.
Q. And then it gave examples here. For example, it could be a USB port, a FireWire port, and the like, right?
A. That's correct.
Q. And then what Apple said is, "In some cases, the data port 718 may be a radio frequency link or optical infrared link to eliminate the need for a cable." Did I read that right?
A. Yes.
Q. I just have one more question for you, Dr. Wicker -- it might turn into two. Do you say the claims are not met in this case if you take the playlist out of storage on the iPod and you operate on it in RAM?
A. If the playlist were actually stored in playlist form on a persistent hard drive, they would satisfy --

the accused devices would satisfy the limitations that call for that. The playlists aren't stored in a playable form in the persistent hard drive. So, by unfolding the database into memory, you're actually creating the playlist at that point in time. So, it's not a matter of where they're played; it's a matter that they never actually are stored as playlists on the hard drive.

Q. So, that wasn't my question. My question is: Do you say the claims are not met if you read the playlists out of storage into RAM and then you operate on the playlists in RAM instead of going back and reading them from the hard disk?

A. Okay. So, I'm going to make sure I understand. So, if the playlists are actually stored persistently, the fact that you take them off the hard drive without changing them or, you know, translating them somehow, put them in RAM and play them from there, that's not an issue as far as I'm concerned.

Q. And you don't have to keep going back to the disk to read the hard drive, right? You can just read and use the playlist in RAM.

A. As long as the playlists -- and this is now a hypothetical. This is not what these devices do. But as long as the playlists are stored in playlist form on the hard drive, sure, you can take them out and put them into

RAM.

Q. All right.

MR. HOLDREITH: I pass the witness.

REDIRECT EXAMINATION OF STEPHEN WICKER

BY MR. ELACQUA:

Q. Thank you, Dr. Wicker. Doctor, let's start off right with what Mr. Holdreith was talking about regarding whether -- what's stored on the hard drive versus what's stored in memory. Can you explain again, Dr. Wicker, sort of how that process works from once the database is on the hard drive and what happens after that, when the iPod is powered on?

A. Okay. During synchronization a computer running *iTunes* places a file, single file, called -- well, let's use the Dulcimer example. It puts a Dulcimer database on one of these devices.

Now, at that point in time the device, when it's being synchronized, is just a dumb hard drive. It's just a hard drive, just sitting there. But when you unplug the cable, this device reboots and it becomes a player again. And at that point it's going to take that single database out of hard drive storage and literally unfold it into memory. It's going to translate it. There's all kinds of software in here that picks pieces of that database and builds playlists, builds contact information, builds all kinds of stuff out into RAM.

So, the point was that that database that comes over from *iTunes* onto this device -- you can't just look in there and see the playlists. They have to be built up by software in the device and put into RAM.

Q. Okay. Thank you.

Now, Dr. Wicker, when someone actually plays back a playlist, does it go back to what's on the disk, the Dulcimer database; or does it use what's in memory?

A. As far as the playlist is concerned, it never goes back to the disk to try and get more playlists, for example. The only time it goes back to the disk is to get audio. In other words, we'll get 20 minutes worth of audio for that playlist; and then it will go back and get more 20 minutes later.

Q. Okay. I want to go back to something that you talked about at the beginning of the day today, the phrase "downloadable navigable playlists." Do you recall that phrase?

A. I believe counsel used it several times.

Q. Okay. Now, does that phrase appear anywhere in the claims of the patents-in-suit?

A. No.

Q. How about the claim construction? Does that phrase appear in the claim constructions of the

patents-in-suit?
A. No.
Q. Okay. Now, before that, I think we talked a little bit about source code relating to DAD; is that right?
A. Yes.
Q. Okay. Was there anything missing from DAD that you felt like you needed to review the source code?
A. No.
Q. And I think a little bit later we talked about Plaintiff's Exhibit 101.
MR. ELACQUA: And if we could have -- actually, I think I could use the Elmo here.
BY MR. ELACQUA:
Q. And Plaintiff's Exhibit 101 was, I believe, the iPod classic user guide. So, I'd like to focus, Dr. Wicker, on these right here (indicating). I think we only really talked about as far as the Internet. What are these bullets describing, Dr. Wicker?
A. Okay. What they're describing are the three ways you can get music into the computer -- in this case it looks like a laptop -- that's running *iTunes*, because you've got to get the music onto the computer before you can move it from the computer to an iPod.
It says the three ways -- I won't read it all,

but basically you can purchase music or audio books or videos from the *iTunes* Store. You can import music and other audio from audio CDs -- and that's why they're showing the CD right there (indicating). You can literally place -- if your computer will play CDs, you can place the CD into a slot on your computer and it will show up in *iTunes* and you can simply copy it onto your computer.

And then the final one is "add music and other audio that's already on your computer." So, if, for example, you had some other audio functionality on your computer, you could copy those files over into *iTunes*.

Q. Now -- thank you, Dr. Wicker.

We talked about a definition from the IEEE dictionary of "choice device." Do you recall that?

A. Yes.

Q. Now, choice device, is that one of the structures in the court's claim construction?

A. No.

Q. Okay. We also talked a little bit about IrDA and the -- IrDA and the infrared link. Do you recall those discussions --

A. Yes, I do.

Q. -- with Mr. Holdreith -- I'm sorry.

You talked about some of the similarities; is

that right?
A. That's correct.
Q. Let's refresh again. Do you have an opinion as to whether IrDA and USB or FireWire, there are any differences?
A. There are substantial differences.
Q. What are some of those?
A. Well, for example, IrDA has to be aimed just like your garage door opener or your TV controller. You have to carefully aim the transmitter at the receiver; so, there has to be an unobstructed line of sight between the two. Otherwise, the data won't get transferred.
For USB it's completely different. I can hook an iPod -- you know, if we assume this is a computer, I could hook an iPod up to the computer and the iPod could be down here (indicating). It could be in my lap. It could even be in my pocket, and I'd still have a connection. So, that is a significant difference, a substantial difference.
Other differences include speed. We talked about that. There's a wide variety of differences.
Q. Now, do you consider IrDA to be a substitute for USB or FireWire?
A. Not in the context of the iPods. In fact, I believe Mr. Fadell testified to that effect. He did not

even consider IrDA as a potential means for connecting these iPods to a computer.

It wouldn't work. There's too much data that has to be transferred. The connection has to be very, very solid. It would be very difficult to synchronize one of these devices using IrDA; and for that reason, I don't think one would swap IrDA in and USB out.

Q. Okay. Dr. Wicker, this is Plaintiff's Exhibit 1074. Does this exhibit appear in the patent -- does this figure appear in the patent?

A. No.

MR. ELACQUA: No further questions, your Honor. I pass the witness.

MR. HOLDREITH: Nothing further, your Honor.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you, your Honor.

THE COURT: Next witness?

MR. CORDELL: Your Honor, with that, Apple calls Dr. Keith Ugone.

(The oath is administered.)

MR. CORDELL: Your Honor, may I make a brief transitional statement?

THE COURT: Do you have any time left?

DEPUTY CLERK: A minute and a half.

MR. CORDELL: I'll make it extra brief, your

Honor.

Good morning, ladies and gentlemen. Thank you again for your service and coming back. I hope everybody had a good weekend. I have good news. This is the last witness that at least Apple is going to present in this trial. And Dr. Ugone is going to help us with the damages analysis and really respond to what Mr. Nawrocki presented to you. Please, please, please don't conclude that because we are talking about damages, we are suggesting to you that any damages are owed. I'll say it one more time. We think the most appropriate damages in this case are zero because Apple simply doesn't infringe these patents. We think the patents are invalid. We'll talk quite a bit about that in closing arguments.

With that I'll turn it over to Ms. Hunsaker and Dr. Ugone.

MS. HUNSAKER: Thank you.

Good morning, ladies and gentlemen.

Your Honor, may I approach with the witness binders?

THE COURT: Please.

DIRECT EXAMINATION OF KEITH UGONE

CALLED ON BEHALF OF THE DEFENDANT

BY MS. HUNSAKER:

Q. Good morning, Dr. Ugone. Could you please introduce yourself to the ladies and gentlemen of the jury?

A. Sure. My name is Keith Raymond Ugone. Last name is spelled U-G-O-N-E.

Q. And, Dr. Ugone, where do you live?

A. I actually live in Grand Saline, Texas. So, if you've ever been to Trade Days in Canton, Grand Saline is the next town over. So, just go up to Tyler, go 30 miles west, and that's where I live.

Q. How long have you lived in Texas?

A. Since 1994, so, about 17 years now.

Q. Do you have any children?

A. I do. Son Number 1, Kyle, is a captain in the United States Marine Corps; and Son Number 2, Casey, lives with me and goes to Tyler Junior College.

Q. Dr. Ugone, what do you do for a living?

A. I'm an economist. Sometimes I describe myself as a forensic economist and a damage quantifier. Now, those are fancy terms; but we'll explain what those mean.

So, a forensic economist and damage quantifier.

Q. So, what does a forensic economist and damages quantifier do?

A. So, the easiest way to think about it is that there's times that companies get into a dispute, much like we have a dispute in the courtroom here. And oftentimes someone such as myself, an economist, is retained to try to figure out what happened or what would have happened in the absence of the dispute. So, that's sort of the forensic economics part of it.

And the damage quantification part of it is if the trier of fact or if a jury determines that money is owed to one of the companies, for a variety of reasons, then I assist in that evaluation of how much money is owed. So, that's what you mean by the "damage quantification" phrase.

Q. Now, Dr. Ugone, did you assist in preparing some slides as demonstratives to help illustrate your testimony today?

A. I did.

Q. And before we get into the specific work that you've done on this case, can you tell us a little bit about your educational background?

A. Yes. So, I've got it up on the slide there.

I went to the University of Notre Dame, and I got an undergraduate degree in economics from the University of Notre Dame in 1977.

Then this next part seems like a contradiction if you follow college football, but then I went to the University of Southern California and got my master's degree in economics in 1979.

And then I went to Arizona State University and got my PhD in economics in 1983.

So, I'm not sure how I did it; but I went to college for ten straight years and got those three degrees.

Q. Thank you.

Let's briefly discuss your work history. What did you do after you got your PhD?

A. Well, after I got my PhD, I taught at one of the California State University system schools in Northridge, California. That's just north of Los Angeles in the San Fernando Valley. I taught there for a couple of years.

Then I went into consulting with PricewaterhouseCoopers, one of its legacy firms. There's been some mergers. But you've heard of PricewaterhouseCoopers because they count the Academy Awards ballots. So, that's where you would have heard from them. Now, I did other things for them; but that's how you probably would have heard of them.

I was with PricewaterhouseCoopers for about 18 years; and at the very end of 2003, beginning of 2004, I joined a company called the "Analysis Group." So, I've been there about seven and a half years.

Q. Okay. So, I have to ask. Did you ever get to go to the Academy Awards?
A. Actually, I was very fortunate when I was at PricewaterhouseCoopers. I used to work on a number of entertainment cases; so, I did get to go to the Academy Awards once. This is dating me, but I think it was the 65th Academy Awards.
Q. Okay. But now you work for Analysis Group; is that correct?
A. Yes.
Q. And what type of work is Analysis Group known for?
A. Well, Analysis Group does economic, financial, and strategy consulting work for corporations, for the government, for law firms. So, it's really in those three areas.
Q. And you specialize in economics and damages-related work; is that right?
A. That's correct. That's what I've been doing over my career.
Q. Okay. So, is it fair to say, then, that most of your work is in connection with valuations in relation to disputes or litigation such as this?
A. Yes. I do economic analysis or valuation work or damages-related work in what I call a dispute-type setting, where companies are mad at each other for one

reason or another.
Q. And have you ever evaluated damages in a patent case before?
A. Yes, I have, many times.
Q. And have you testified in court in patent cases before?
A. Yes, I have.
Q. Have you testified here in Beaumont?
A. Yes. Yes, I've testified in Beaumont.
Q. Now, is the company that you work for being paid for the work that you've done on this case?
A. Yes, they are.
Q. And what is the rate that the company is being paid for this?
A. So, the hourly rate that Analysis Group charges for my time is $550 an hour.
Q. And is that compensation in any way dependent on the opinions that you render in this case?
A. No, it is not.
Q. So, let's turn to the work that you did for this case. First of all, why don't you tell the ladies and gentlemen of the jury what you were asked to do.
A. Well, I was asked to really do two things: One, if a determination is found that the patents are valid and infringed -- so, it's only under those conditions

that my opinions come into play because if the patents are not valid or not infringed, then what's accused of in this case in terms of an infringement -- and obviously I'm not the one to give legal advice. That's up for others. But from a damages perspective, then there is no damages if there is no infringement or the patents are invalid. But obviously you need legal advice on that. I'm not giving the legal advice. So, that's what this first slide is saying.

But if we get over that hurdle, if the jury, the trier of fact, were to determine that the patent is infringed and is valid, I was asked to do two things. I was asked to independently come up with my opinion as to what the appropriate amount of damages would be under those conditions. And the second thing I was asked to do was to evaluate the work of Mr. Nawrocki, who you heard testify last week, who gave his opinion as to what claimed damages should be.

Q. Okay. So, Dr. Ugone, can you tell the ladies and gentlemen of the jury what opinions you reached with respect to damages in this case?

A. Yes. The opinion that I've reached is that -- and we're going to talk about this in more detail. But if the parties, Personal Audio and Apple, had gotten together and negotiated a license for the patents that are in dispute here, they would have negotiated a license that would have given Apple certain rights, freedom to operate, to use the claimed teachings of the patents-in-suit, the two patents we've been talking about; and that the payment that would have been agreed upon for a license to those patents would have been no more than $5 million.

So, there's two critical parts to my opinion. The first one is it's something called a "freedom to operate license," and we'll talk about that in more detail, what that means.

The second part is there would have been a payment no greater than $5 million.

Q. So, why don't you tell us what you mean when you say, "freedom to operate."

A. Well, the easiest way to think about it is that there are certain reasons why companies enter into freedom-to-operate-type agreements. They might be producing new products. They don't always have to want to run back to the licensor and renegotiate; so, the easy -- and they're undertaking -- as we've heard, Apple at times likes to, in a sense, make a splash in the marketplace. They don't tell people what the new products are going to be; and then they introduce them with a big marketing splash, those sort of things.

But the whole point is that sometimes a company wants the freedom to, in a sense, take a technology off the shelf and put it into various products; and that's easiest to do when you have a freedom to operate license rather than just specifying what products the technology will be used in, especially in cases where companies are changing their products frequently, coming out with new models.

So, they want to be in a situation where they can say, "Okay, we've licensed a technology. We now have it on our shelf. And then when I start developing new products, I can just kind of take that technology off the shelf and put it into my product and legally so because I have a freedom to operate license."

So, it just makes good business sense for certain companies to enter into those sort of licenses.

Q. One of the things that Mr. Nawrocki testified about was that a patent license could be considered clearance to use technology. Does that relate to a freedom to operate at all?

A. I think we used the same terms. I described it as "freedom to operate." He used the term "clearance," but I don't think we disagree on that concept.

Q. So, what products would a lump-sum freedom to operate license apply to with respect to Apple?

A. Well, it would apply to the accused products here. We've talked about all of the iPods -- the classic, the nano, the mini. But it would also apply to any other product that Apple choses to use the technology in. That's what it means by "freedom to operate." But specifically here there's the accused products, the iPod products -- classic, nano, and mini -- but it would also apply to other products if Apple so chose to use other products.
Q. What about with respect to royalties into the future? How would a freedom to operate affect that?
A. Well --
Q. Actually, if I could rephrase that.
How would the lump-sum and the freedom to operate license that you concluded the parties would have reached -- how would that affect the future damages?
A. Well, the way this licensing arrangement would work is sometimes you'll hear the term called a "lump-sum license arrangement." And, so, when I was talking about a royalty payment no greater than $5 million, that can take a number of different forms. But once the $5 million is paid, that, in this sort of license agreement with the permission of the licensor, gives the licensee the permission, because of this license agreement, to use that technology in the products that

they choose to put the technology in.

But I guess here is the key: Once the $5 million is paid, it's like a fully paid-up license. So, you don't have to continue to make payments after that because in a sense you've bought the right -- not bought the right. I shouldn't use that term. But you've licensed the right to use the technology in a freedom-to-operate way. So, there would not be ongoing payments.

Q. And in the evidence that you've reviewed in connection with this case, did you see anything that indicated that Mr. Logan and the Logan Family Trust on their behalf would be willing to negotiate such a license?

A. Yes. I've seen situations -- and we'll get into more detail here. But I've seen evidence in the record that there were times that Mr. Logan, either through the sale of his patents or advertising on his Web site, had a willingness to accept what I'm calling a "lump-sum payment." Now, the payment could take place in installments; but the key is it is up to a fixed amount that it does not go beyond.

Q. Thank you, Dr. Ugone.

Let's move on to some of the work you did and the materials that you reviewed in coming to your opinions in this case. So, could you briefly describe to the jury the work that you did in order to form your opinions in this case?

A. Well, I had an understanding of the facts in the case. There were legal documents I had to review. And then both parties -- it's called "produced" a substantial amount of data and documents. And, so, I've made this slide that shows some examples of the evidence that I reviewed.

There was Personal Audio information, Personal Audio documents, depositions, legal documents, interrogatory responses, correspondence.

Then in the middle column there, there was Apple information that I looked at, various documents that had unit sales records, for example, for the iPods we've been talking about, depositions, surveys; and you can see everything that I looked at there.

And then there was other information as well. So, I reviewed Mr. Nawrocki's report, Dr. Peterson's report. There were some technical expert reports that you've heard testify and obviously trial testimony as well.

Q. Okay. So, it sounds like you reviewed a lot of the same documents that Mr. Nawrocki reviewed; is that right?

A. Yes. In a legal setting such as this, both parties get the same information; so, Mr. Nawrocki and I both reviewed the same information.
Q. Okay. Now, we've heard about the hypothetical negotiation. And Mr. Nawrocki talked about doing a *Georgia-Pacific* analysis in accordance with certain case law. Did you also do that?
A. Yes. So, I did a *Georgia-Pacific* analysis as well.
Q. And did you also consider the 15 *Georgia-Pacific* factors that are discussed in connection with that case?
A. Yes, I did.
Q. And in addition, did you also consider what's called the "hypothetical negotiation analysis" and the concept of a willing licensor and a willing licensee?
A. Yes. And the jury may recall that was *Georgia-Pacific* Factor Number 15; but yes, I did consider it. It was called a "hypothetical negotiation."
Q. Okay. And tell us a little bit about what that framework involves.
A. The easiest way to think about it is there was no license agreement between Personal Audio and Apple. Okay? But in order to evaluate damages, if the patent is found to be infringed and if the patent is found to be valid -- if those two conditions are met, you have to

take yourself back in time and say at the point in time where a license would have been required and if the two parties had gotten together to negotiate, what would they have negotiated in terms of the payment associated with a license agreement.

Now, that did not happen; so, that's why it's called a "hypothetical negotiation." But that's the framework. So, it's almost like saying the negotiation didn't take place. There wasn't a license agreement.

But let's go back in time when the license first would have been required to be had and what would the parties have negotiated, what would have been the considerations, what would have been the outcome of that hypothetical negotiation.

Q. And again we heard Mr. Nawrocki talk about the date of the hypothetical negotiation. What dates did you consider in the hypothetical negotiation in your analysis?

A. Well, I accepted the date that Mr. Nawrocki was using. That was October, 2001; so, that was the date of the hypothetical negotiation.

Q. And was there also a later date in relation to the '178 patent that you considered?

A. Yes. So, that would have been March, 2009.

Q. Okay. Now, did you make the same assumptions in your analysis that Mr. Nawrocki made, that the patents were valid and infringed in this case?

A. Yes. And, in fact, that's a -- it's almost an assumption I'm required to make because as I've been saying, if the patents aren't assumed to be infringed and valid, then you don't get to the damages question. So, I'm required to make that assumption in my analysis.

Q. Okay. And, so, you're not here today saying that you agree with that, that the patents are, in fact, infringed or that they are valid. That's an assumption that you're required to make; is that right?

A. That's correct. That's not for me to decide those issues.

Q. Okay. Now, what other assumptions did you make concerning the hypothetical negotiation?

A. Well, we have them up on the board there. But the easiest way to think about it is this is a negotiation that's taking place -- albeit a hypothetical negotiation -- but you have two parties. You have actually the Logan Family Trust on one side, and Mr. Logan would have been negotiating on behalf of the Logan Family Trust on one side of the bargaining table or negotiating table as we see there. On the other side would have been Apple.

But it's important to know that both parties are willing to negotiate. That's an underlying assumption, that they are willing to negotiate; and here is an important key, that they have sort of reasonable knowledge. They go in smart. They're prudent businesspeople. Right? So, they know the relevant facts and relevant considerations; and they go into the negotiations with those relevant considerations in mind, including reasonable expectations as to future events.

So, think about a prudent businessperson going into a negotiation; and that's the way to think about the considerations that they would be discussing, that they would have in their mind.

And both sides would act reasonably and voluntarily to negotiate to try to reach an agreement. So, those are really the underlying assumptions for the hypothetical negotiation.

Q. So, in the hypothetical negotiation can one side or the other dictate exactly what's going to happen?

A. Well, it has to be an outcome that both sides will agree to. Since it's a negotiation and it's a -- there is a willingness to negotiate, you can't just have one side dictating what the outcome is. It has to be an outcome that both sides would agree to.

Q. So, Dr. Ugone, we've said -- you've testified that the hypothetical negotiation is hypothetical because it

never took place. But in the context of your analysis, who are the parties at the negotiating table, for starters?
A. Right. So, it would be the Logan Family Trust; and Mr. Logan would be there negotiating for Logan Family Trust. That would be on one side of the table. And on the other side of the table would be Apple or an Apple representative.
Q. Okay. So, in the context of the hypothetical negotiation, do real-world facts matter?
A. Yes, because what we're trying to do is, in a sense, simulate the negotiations that would be taking place. And, so, you need to know the real-world considerations that both parties would be negotiating over when they're trying to determine the appropriate license payment to make for a license to the patents-in-suit. So, yes, you take into account real-world considerations; and those are the topics of discussion at the hypothetical negotiation.
Q. Okay. So, let's talk about the hypothetical negotiation in 2001. Could you summarize for the jury the real-world facts that you considered in your opinion in this case?
A. Yes. And there's a lot of bullet points up there; so, we're going to talk about six of them. And some of

these, what I'm going to do is -- there's been certain testimony, and then I'm going to explain how we put all that together to determine what the appropriate royalty payment would be if there was a license that had been agreed to at the hypothetical negotiation.

So, what are the real-world factors that matter? What are the considerations? What would people be talking about at this negotiating table? The negotiators would be talking about Apple's innovations and contributions to the accused products. They would be talking about some of the limited additional benefits of the patents-in-suit; so, that would be a topic of consideration.

There would be a situation where there's, in this case, two Apple comparable licensing agreements; so, that's almost like what -- Apple would be using that as a proxy. It's kind of like when you are trying to figure out how much you sell your house for. You see how much other houses are selling for perhaps in the neighborhood. It's that concept. So, there's comparable licenses.

There's the fact that Mr. Logan was not able to commercialize a product that contained the claimed teachings of the patents-in-suit. This was a very interesting environment, the 2001 environment. We'll get into a little bit of detail; but you can remember there was economic uncertainty, there was recession, there was 9-11. There was also certain product risks that we've heard about, introducing a new product to the marketplace during that period of time.

And then there's other value indicators of the patents-in-suit which include -- and I think you've heard of this -- the jury has heard this -- about Mr. Logan's offer to sell the patent-in-suit for $5 million to Concert Technologies.

So, what I'm trying to do is just lay out here and get you in the mind-set of thinking about what would be the topics of discussion, what are the negotiating points; and that's what I've listed here on the screen.

Q. Thank you, Dr. Ugone.

So, let's turn to each of these real-world facts that you considered. And first let's focus on Apple's contributions to the iPod products. So, can you explain your understanding of the innovative features of the original iPod?

A. Right. And I kind of want to put this in context for you. So, I'm looking at this from an economic point of view or what are the drivers of sales. If the iPod was going to be a successful product and have a lot of unit sales, for example, what are the factors that contribute to those sales?

And we've heard from -- and seen from the Dulcimer document and the P68 document and from testimony that one of the major sort of top-of-the-mind themes was the thousand songs in your pocket. That was so people could take their entire music library, put it in an iPod, carry it in their pocket. That was a major concept that Apple wanted with the iPod.

And then as we go to the -- I call them "quadrants." As we go into the four quadrants, in the upper left, you know, very, very easy-to-use interface to scroll through all of your songs on your iPod. That was important.

The long battery life. We've heard testimony that certain other products that were out on the market when they were going to have a large number of songs or when there was hard drives involved, that the battery life was actually relatively short. So, Apple wanted a product that had a long battery life.

There was a fast connectivity. We've heard some testimony about the FireWire concept where you could transfer your songs onto the iPod relatively quickly.

And then, finally, the innovative design where, you know, the first iPod that was made, the classic, I think was described as being about the size of a deck of cards, which you can see.

So, the whole point was Apple wanted to come out with a new product, an innovative product. Their ideas which they were hoping would drive sales of the iPod were the considerations that I've put on the screen up there -- thousand songs, easy-to-use interfaces, long battery life, fast connectivity, and the innovative design.

Q. Thank you.

So, these were some of the features that were marketed as distinguishing the iPod from other players that were on the market at the time; is that correct?

A. That's correct.

Q. Now, you mentioned the Dulcimer document that was Defendant's Exhibit 42. Do you recall that?

A. Yes, I do.

Q. And what are some of the things you found relevant from that document?

A. Well, that was, in a sense, Apple's vision for the product. The code name was "Dulcimer." Sometimes we saw the documents referred to as "P68." But if you just read the first or second sentence there, everything that I just talked about in that last slide, you can see that that was their vision for the product. So, "a portable audio jukebox with industry-leading user interface and industrial design. It differentiates itself from the competition with its perfect blend of high-capacity storage, small form factor, minimal weight, long battery life, and fast and convenient connectivity."

So, that was in the original Dulcimer documents, the vision for the iPod product.

Q. Now, we've heard some testimony; but did Apple have any patents on some of their innovations that they incorporated into the iPod?

A. Yes. So, they had the innovative concepts that we've been talking about; but, in fact, they also had, for example, a patent on the scroll device. So, as we see here, United States patent entitled "Method and Apparatus for Accelerated Scrolling." That was a patented technology that Apple was bringing to the table. So, that way you could search quickly through your songs using a scroll wheel.

Q. And we're not going to talk about all of them, but did Apple also have other patents incorporating features of the iPod?

A. Yes. My understanding is yes, they had other patents as well.

Q. Now, what is the economic importance of the differentiating features of the original iPod at the time of the hypothetical negotiation?

A. The -- I'm sorry. What is the economic significance of what I'm saying? Is that the question?

Q. Yes.

A. So, the economic significance is we're thinking about what would be the considerations and the negotiating points at the hypothetical negotiation. One consideration is that Apple would be saying, "Look what we're bringing to the table." That's what Apple would be saying, the Apple representative. Apple would be saying, "We're bringing this innovative design, this concept of a thousand songs in your pocket, this new device, you know, size of a deck of cards, long battery life."

Apple would be saying, "If this thing is going to be a success, it's because of those contributions that we're bringing to the table; and that will drive the unit sales."

If you think about it, that would be Apple's position at the hypothetical negotiation.

THE COURT: All right. Counsel, we're going to take a break.

Ladies and gentlemen, I'll ask you to be back at 11:00.

(The jury exits the courtroom, 10:47 a.m.)

THE COURT: Okay. To avoid problems later on, the *Georgia-Pacific* factor talks about the reasonably prudent licensor and the reasonably prudent licensee, now, such as the plaintiffs; but it is not the construct of the plaintiff and the defendant themselves at the table.

Now, that's not to say other factors doesn't -- it's not as clear as the typical condemnation analysis. I will grant that. But because this is also going into future damages, I would appreciate it if counsel and the witnesses would be very careful about that because it's not -- Factor 15 is not them at the table; it's like them. And really it's that reasonably prudent person who was there.

Now, earlier factors may get into that; but that's what the instructions are going to wind up being and that winds up being the analysis on future damages and there is no point in messing up the record too much early on.

All right. We'll be in recess, then, until 11:00.

(Recess, 10:48 a.m. to 10:53 a.m.)

(Open court, all parties present, jury present.)

THE COURT: Ms. Hunsaker, please continue.

MS. HUNSAKER: Thank you.

BY MS. HUNSAKER:

Q. Dr. Ugone, did Apple achieve high sales with the

iPod product line immediately upon its introduction?
A. Actually sales started out relatively slowly. In the first year of introduction of the product, I think they sold like 200,000 units; and then in the second year, it was like 600,000 units. So, it actually started out relatively slowly compared to the sales that we see today.
Q. And why is this important in evaluating reasonable royalty?
A. Well, the easiest way to think about it is that companies have to make continuing contributions to make a product successful. So, there's going to be R&D to improve the product over time. There's going to be marketing efforts. There's going to be, you know, all of the things that are required in order to make the product successful.
So, the reason why that's important for the hypothetical negotiation -- so, if at the hypothetical negotiation you have a patent holder and you have a potential licensee -- so that general framework -- when those two sets of people are negotiating, one thing that's going to take -- they're going to take into account is on a going-forward basis what are some of the investments that might have to take place.
So, you can talk about the marketing, the R&D,

and the advertising and so forth.

Q. Now, you mentioned Apple's R&D, or research and development. And can you give some examples of those research and development efforts that contributed to the commercial successful iPod?

A. Well, especially with a technology-type product, you're going to learn things once you introduce the product into the marketplace. And I think we've heard testimony about the various generations of the iPod classic that came out, the various generations of the iPod mini, the various generations of the iPod nano.

But the point is in each of those subsequent generations, over time, Apple was introducing new features. They were improving the product, and they had to undertake R&D in order to develop those products. And, so, for example, there was the, you know, ultra-portable design, the really small iPod, when we get to the mini and the nano.

There was the fact that over time they started adding the photos and video capabilities that were not in the original iPods. The storage, you know, went from 1,000 songs to now 40,000 songs. And they also had the concept of the *iTunes* music store. So, those are all things that companies, to try to commercialize and make a successful product, are going to have to make investments in the product. And, so, when you have prudent negotiators at the hypothetical negotiation, that would be a consideration.

Q. Now, you've talked about research and development. What about marketing?

A. Marketing. Products don't necessarily just sell themselves. An important part of marketing is, A, getting the message out, what's the message about the product, what's the brand name about the product. But also marketing and advertising provides information. It provides a service to the consumer. Unfortunately that costs money but Apple had a marketing strategy that drove iPod sales and that included the development of retail stores that they had developed and also some original advertising. You see the sort of silhouette picture on the right-hand side. That made a big splash when Apple started that advertising in the marketplace and very much helped sales.

But the point again is that those are all the types of things that on a going-forward basis -- but if you take yourself back in time, you know, on a going-forward basis those are the types of investments that companies will have to make, whether it's R&D or in this case whether it's the advertising. Those are additional. On the one side of the table the prudent negotiator on one side of the table could be saying, "Those are the kinds of investments I have to make in the marketplace."

Q. And, so, why is that important when evaluating reasonable royalty?

A. Well, to the negotiators at the table -- and both sides would recognize this -- this is the contribution of in this case sort of the -- you know, the company that's providing the product to the marketplace. So, in this case it would be Apple is providing a product to the marketplace and they're going to have to make these contributions over time.

And that's part of the reasonable expectations on a going-forward basis, that you would expect those sort of investments to take place if there is going to be a commercial product and if you're ever going to get those sales to increase to a substantial level.

Q. Now, what has been the trend in the average iPod selling price over time?

A. Well, this is another interesting dynamic that was going on. I've got some bar charts here. There is the left-hand side and right-hand side.

The left-hand side, there's two bars that shows the price of the iPod classic. The right-hand side shows the price of the iPod nano.

But what I wanted to show here is -- and I'm going to bring in a fundamental economic concept. A fundamental economic concept is the lower the price, the more people will buy. And, so, what Apple was doing here is that they were lowering the price of the classic from $372 to $219. That was a 40 percent decrease in the price of the iPod classic.

And when prices are lower, holding everything else constant, people buy more of the good. So, that was another driver of the iPod sales.

You can also look at the nano and the whole idea of the nano -- and they also had this with the mini -- was that they knew that the classic was a relatively more expensive product and, so, they were introducing a less expensive product into the marketplace and even that price decreased over time. But again, that's another driver of how much people buy.

Q. And, so, what are the implications of everything that we've been discussing about Apple's contributions for the reasonable royalty payment that would have been agreed upon at the time of the hypothetical negotiation?

A. So, again, we have prudent negotiators at the hypothetical negotiation; and these could just be general negotiators; but we're looking at the considerations they would take into account. One consideration they would take into account would be the contributions from, in this case, Apple to the success of the product; and that would be things like R&D, marketing, their pricing strategies. And the ability of those factors, quite independent of the claimed teachings in the patent-in-suit, these factors I'm talking about as a driver of sales.

Q. During Mr. Nawrocki's testimony, he said he took into account Apple's contributions. Do you agree with that statement?

A. No, I do not agree with that statement.

Q. Why not?

A. Well, here is the easiest way to think about it. He showed a chart and he did a bunch of math and when it was all done, he got to this 90-cents figure and he said -- and you-all remember Dr. -- Mr. Nawrocki's testimony; so, I don't want to speak for him. But what he said was "I'm going to take the 90 cents and multiply that by all the iPod units."

But what that misses is what I call the "quantity effect." In other words, he's taking that 90 cents; and he's multiplying it by all the units. But why are the unit sales so high? And one reason why the unit sales are so high are the contributions that Apple was making, the new generation of products, the new R&D

that they were undertaking, the advertising, the lowering of the price. All of those cause sales to go up from that very low level in the early years to a much higher level in -- you know, after three or four years. But Mr. Nawrocki was taking the 90 cents times all the units when that huge ramp-up was coming from the actual Apple contributions.

Q. Let's take a look at some of those unit numbers. Can you explain what the unit sales in relation to Apple's contributions are reflected in this slide?

A. So, what I've done here is I've drawn the unit sales of the accused products. And, so, when we're talking about unit sales, it's how many of these devices, of the iPods; and that includes the classic, the mini, and the nano.

And it's over time -- so, those are the unit sales that are being plotted. But what I was also wanting to show in this chart is there were things that Apple was doing that drove those sales up. There was the *iTunes* for *Windows*, that they made the iPod more easily compatible with *Windows* computers rather than just Mac computers. The mini was introduced. The nano was introduced. And each of those new generation of products caused a ramping up in sales. The point is those are independent of, or not dependent on, the claimed teachings of the patents-in-suit.

So, a negotiator at the negotiating table would say, "Look, the reason why sales are going to go up is because of these investments that a company such as Apple is going to make."

Q. So, we've talked about Apple's contributions. Let's shift gears a little bit and talk about the added benefit of the patents-in-suit. So, have you seen any evidence that indicates the claimed benefits of the patents-in-suit are limited as compared to what already existed?

A. Yes. And I've seen testimony and evidence as to what the inventors did not invent, for example; And I think there's been some testimony on that.

Q. And how do you know, for example, that Personal Audio did not invent "skip" buttons as you have in the left-hand upper quadrant of this slide?

A. Well, I know this from a couple of different places. I think there was testimony on it; but also in the file history of the patent, the patent examiner commented that "skip" buttons had been around for a long time. We've seen them on VCR devices or CD remote-control devices. So, that's how we know that.

Q. And how about, for example, downloading files from the Internet? Did Personal Audio invent that or claim to

have invented that?
A. My understanding is that that is not a part of the claimed invention as well.
Q. Now, how about the concept of playlists? We've heard a lot about playlists. Is that something that Personal Audio claims to have invented or that you would have considered in this hypothetical negotiation?
A. Well, there was deposition testimony I'm aware of where they admitted to not having invented playlists.
Q. And how about trial testimony from Mr. Call? Did you consider that?
A. Yes, as well; and, so, I have a -- part of his transcript up here.
Q. Okay. And what's reflected in this transcript that you considered?
A. Well, he was asked the question "Why didn't you use the term 'playlist'"; and there are some highlighted sentences.
"Well, playlist is a more generic term and not all playlists control things."
Skipping down just a bit, "You might have a playlist that does control things; but that's too generic for what I wanted. It doesn't convey what I wanted. Somebody might get confused and think that that means any old playlist, and that's not what I meant."

Q. Now, did you consider any testimony from any of the other inventors in this case?

A. Yes. I think we saw some video deposition tapes, as well, from Mr. Goessling.

Q. Okay. And the slide that's on the screen, does this reflect Mr. Goessling's testimony regarding playlists?

A. Yes. So, again, this is saying that the inventors did not invent playlists or easy navigation. "So, would you agree that there were software players in the marketplace before you got involved with Mr. Logan on the player project that allowed you to create playlists of audio files that you brought into your PC from somewhere else and then skipped forward to the next wav file?"

He says, "It looks that way."

"So, you guys didn't invent that notion, right?"

"I don't think we did," was his testimony.

Q. So, from a damages perspective, what's the economic significance of these things when evaluating reasonable royalty?

A. So, whoever is at the hypothetical negotiation trying to determine the value of the license or the payment would be taking into account what's the incremental value. So, playlists were already out there.

The concept of downloading files was already out there. So, that would be a topic of discussion relative to not sort of confounding or confusing the benefits by bringing in things that were not part of the invention.

Q. So, you mentioned "incremental" benefits. Besides the accused playlist features that have been discussed in this case, are there other ways you're aware of for accessing music on the iPod?

A. Yes. And I have a slide here where I've put some of those other what I'm calling "unaccused ways of accessing music."

So, there's the claimed invention, which everybody has heard about; but there's also "on-the-go playlists." There's cataloging your music by artists and by albums or by songs.

Q. Dr. Ugone, let me interrupt you for a second. What are on-the-go playlists?

A. On-the-go playlists -- think of it this way: It's creating a playlist on the iPod as opposed to creating a playlist, say, on your computer and then downloading the playlist to the iPod.

So, my understanding is that creation of the playlist occurs in a different spot. It occurs when you have your iPod as opposed to on the computer.

Q. Okay. And, so, what is the economic significance

of having other ways to access music on the iPod?
A. So, the easiest way to think about it is that one of the messages of the iPod was to have easy-to-use interfaces. You can see other songs. You can scroll through, and there's just a lot of different ways that you can play your music. That's the point, that there's options.
Q. Okay. Dr. Ugone, let's turn to the next real-world fact. Does Apple ever license patents from third parties?
A. Yes, they do.
Q. And did you identify any Apple license agreements that you believed were comparable to the license that would be negotiated in the hypothetical negotiation?
A. Well, there were certain Apple license agreements that became available; and I think the best way I would phrase it is that obviously there's technical sides of these agreements and I'm an economist. I look at dollars and cents. I'm not the technical person. But I had discussions with Dr. Wicker, and he told me about the comparability of the technical side of these agreements.
Q. So, are we going to look at two comparable license agreements in the next part of your testimony?
A. Yes. That's correct.
Q. Now, before we do that, why would you look at

comparable license agreements in determining the appropriate amount of a royalty in this case?
A. Well, the easiest way to think about it is negotiators are going to try to come up with indicators of value. They're going to look at the totality of the information. They're going to try to triangulate to what this license agreement -- the amount the payment should be. And one way to do that is to say, "Well, are there any comparable situations out there where a license agreement has been entered into, and what was the amount of the license agreement?" So, that's an important data point, in combination with all of the other data points. So, that's why you look at this.
And I gave you a little example previously that, you know, if you were going to sell your house, you would look at other similarly-situated houses, what are they selling for and will those other houses give you guidance as to what you should sell your house for.
Here we're not talking about selling the patents. We're talking about a license agreement, but the concept is similar.
Q. What was the first agreement that Dr. Wicker identified as being comparable to the patents and license at issue in this case?
A. Well, it was an agreement that Apple had entered

into with a company called "E-Data." And it was in mid 2004 and it had one U.S. patent and four what's called "foreign counterparts"; but those are kind of similar patents but just in a different country, is maybe a way to explain that. And, so, that was a license agreement that Dr. Wicker had identified as comparable.

Q. And with respect to your earlier testimony that a license agreement in this case resulting from the hypothetical negotiation in this case would apply to all Apple products, did anything in the E-Data agreement suggest to you comparable terms that Apple had previously negotiated?

A. Yes. It says it defines an Apple product -- it means "any product, hardware service, or software that is or was made, used, sold, offered for sale, leased, licensed, imported or otherwise disposed of by Apple or an Apple subsidiary at any time."

So, that's just some fancy language for what I was saying previously about a freedom to operate.

Now, there are a few more little complexities on this license agreement that we'll get into; but that generally was the case, that this was a freedom-to-operate license.

MS. HUNSAKER: Mr. Barnes, could we pull up Defendant's Exhibit 282A, please?

BY MS. HUNSAKER:
Q. And looking up there at the first paragraph, is this the E-Data license agreement that you just referred to?
A. Yes.
Q. Okay. And going down to paragraph 1.1, you see that? Is that the definition of "Apple product" that you just testified about?
A. Yes. That's correct.
Q. Okay. And if we could turn to the next page of this agreement, going under paragraph 2.1 talking about the license and release, do you see that?
A. Yes, I do.
Q. And does this paragraph, in fact, describe licensing all of those accused -- excuse me -- the Apple products that you referred to in the previous part of your testimony?
A. Yes. So, this would be another way to phrase what I've been talking about, yes.
Q. Okay.
MS. HUNSAKER: And then if we could go on and look at page 3 of this agreement under "consideration."
BY MS. HUNSAKER:
Q. First of all, looking at paragraph 3.1 and the beginning of 3.2, what does this tell us about the

compensation or the royalty payment that Apple would make in connection with the E-Data agreement?

A. On the slide you saw previously, it said a maximum payment of $500,000; and then I said there's a few other little complexities. We're now going to talk about those complexities.

The initial payment is $250,000. So, that's what paragraph 3.1 is telling us.

Q. Okay. And how about the first sentence of paragraph 3.2?

A. It says, "In addition to the payment of Section 3.1, on or before April 15, 2005, Apple will pay to E-Data an additional amount, if any, up to a maximum additional payment of 250,000 U.S. dollars." And then it has "$250,000" in parentheses.

Q. Okay. Thank you, Dr. Ugone. Now let's look at paragraph 3.3 of the same agreement. Does this reflect anything about your testimony concerning the maximum amount of payment under the E-Data agreement?

A. Yes. And, I mean, not necessarily all license agreements are like this; so, don't get the wrong idea on that. But in this comparable licensing situation, Apple and E-Data entered into an agreement where there was a, in a sense, maximum payment that would be paid for the use of the claimed teachings of the patent.

So, there was the initial 250,000-dollar payment. There might be some additional payments. But under no conditions would the payments go above the $500,000 which is shown in 3.3.

Q. Thank you, Dr. Ugone.

So, what was the second agreement that Dr. Wicker identified as being comparable to the patents-in-suit?

A. So, this was an agreement between Apple and a company called "Digeo." And this agreement was entered into in early 2006. It was a royalty payment of 1,750,000, which I may have to explain a little bit; and it covered three U.S. patents and a patent application and a foreign patent.

Q. So, Dr. Ugone, I skipped one thing in relation to the E-Data patent; so, let me just go back to that for a second.

What was the -- to the best of your understanding, what was the technology that was covered by the license in the E-Data agreement?

A. Well, my understanding is based on my discussions with Dr. Wicker; but it dealt with organizing and downloading information from a central location.

Q. Okay. Thank you.

So, moving on to the Digeo agreement, could

you describe this agreement for us?
A. Well, we've got the effective date of 2006, the royalty payment of 1,750,000. It covers three U.S. patents. And it also defines the licensed product there in paragraph 1.1, which "means any Apple-branded or Apple affiliate-branded (including co-branded) product, service, device, system, hardware, software, or other offering." I'll stop there. But the concept is this freedom-to-operate concept again that will cover Apple's products.
Now, there's a few more complexities that I'm sure we'll get into; but that's the concept.
Q. Now, as to my last question on E-Data, to the best of your understanding, what was the general area of technology covered by this license?
A. And my understanding from Dr. Wicker is it is very similar technology in terms of organizing and downloading information from a central location.
MS. HUNSAKER: Mr. Barnes, could we pull up Defendant's Exhibit 278, please?
BY MS. HUNSAKER:
Q. So, on the screen is DX 278. Is this the license agreement between Apple and Digeo?
A. Yes. You can see the company names and also the date in the upper right-hand corner.

Q. Now, if we look down to paragraph 1.1 under "definitions," you talked before about "Apple products." Does this describe whether or not those products are covered by the Digeo license?
A. It does. And there's "licensed product," which you can see right at the beginning of paragraph 1.1.
And then if you go down, fifth line down, on the far left it says "excluded product" -- I'm sorry. You've got to go back to the other line. It says "provisionally excluded product." But there's really two different sets of products; there's the licensed products and provisionally excluded products.
Q. Okay. And with respect to provisionally excluded products, those are described in paragraph 1.4; is that correct?
A. That's correct.
Q. Now, if we look under -- on the third page of this agreement under "consideration," does that describe the payments that Apple would have been agreeing to pay under this agreement?
A. Yes.
You can see in paragraph 3.1, which is a payment that relates to the licensed products, and then for an additional payment of a million dollars that will cover the provisionally excluded products. So, it's the

combination of the two which got to the 1,750,000 that would cover all of Apple's products.

Q. And since that's a little bit confusing, why don't we bring up paragraph 2.7 that describes the provisionally excluded products.

MS. HUNSAKER: And if you could highlight the first sentence of that.

BY MS. HUNSAKER:

Q. Does this describe what you were just talking about?

A. Yes. So, in a sense, Apple is getting a little bit of an option here; and it says, "At any time during the existence of this agreement, and at Apple's sole discretion, Apple may provide Digeo with written notice that Apple wants to extend its license to include provisionally excluded products."

Q. Okay.

MS. HUNSAKER: So, if you could, then, bring back up the consideration regarding payments just so we can bring those two things together.

A. So, if Apple does not want what's called these "provisionally excluded products" to be licensed products for them, they pay the $750,000. But if they want more products covered, it's an additional million dollars. But at that point that's, in a sense, one aggregate payment that's made that will cover all of the Apple products.

BY MS. HUNSAKER:

Q. And is that reflected in paragraph 3.3?

A. Yes. "The payments of Section 3.1 and, if applicable, Section 3.2 shall be the total compensation for Digeo for the rights granted in this agreement."

Q. Okay. Thank you, Dr. Ugone.

So, now, are there similarities between these two comparable license agreements that Apple entered into and the agreement that in your opinion would have been entered in this case?

A. Well, there are similarities. We heard -- and I understood from Dr. Wicker that these were technologically comparable license agreements. We saw that there was a small number of patents associated with the agreements. And if you look at these two agreements that we talked about, they had some commonalities.

On the left-hand side there was either a lump-sum amount or a capped payment. So, in other words, there wasn't ongoing, continuing payments in these agreements. There was either a lump-sum or a capped payment; and then that was, in a sense, a fully paid-up license.

They covered all Apple products, and they were basically freedom-to-operate licenses. So, that's what were in these two licenses.

Q. So, now, Dr. Ugone, generally speaking, do other kinds of license agreements exist besides a lump-sum and freedom to operate?

A. Yes. And that's why I was saying that's what was in these two type agreements because I don't want to give the impression that that's the only type of agreements that companies enter into. There's many different forms that a license agreement can have.

There's something called a "running royalty rate." A running royalty rate could be a per-unit amount that you pay for each unit that's produced and sold; or it could be a percentage of revenue, that you pay a certain percent on the revenues associated with the product. Those are called "running royalty rates."

There could be lump-sum payment agreements or close cousins that have either lump-sum amounts or capped amounts such that the aggregate amount that's paid doesn't exceed a certain level. That's at the other end of the spectrum.

And then in between you can have combinations of the two. So, that's kind of a spectrum of the different license agreements you can enter into. These two were lump-sum or capped payments as opposed to running royalty rate payments.

Q. Okay. And, so, what are some of the considerations that you considered in determining that the two particular Apple license agreements that we looked at were comparable to the hypothetical negotiation here?

A. Well, think about the business situation we're in. So, this is where you get some of the economic and business comparability. But if you have negotiators negotiating a license to the patent-in-suit, they would know about the need for -- you know, we've got, in a sense, a high-tech product. There's going to be changes over time. There's many, many different features; and it's going to be a lot of different contributions that lead to the sale of these products over time. And there's not this nexus between or connection between the claimed invention and driving up sales much like we saw in that one chart. All of those would be important considerations, and those are some of the considerations that lead to a lump-sum agreement because the parties would know that -- both parties would know that the reasonable outcome would not lead to a situation where there is an overpayment for the license.

So, for example, if you start paying a certain amount per unit, you can get up to a very, very large amount when sales start increasing; but that's the contribution of one of the sides versus the other side. So, a lump-sum or fixed aggregate amount prevents that situation from occurring.

Q. And would it matter whether it was a license agreement for a bare patent license, for example?

A. Well, think of it this way. Would the bare patent license -- and what do we mean by that? That's just a license to the claimed teachings, but there is no know-how that's communicated with that license. There is no technology. They are not giving you source code; so, it's just a bare patent license. So, that's an important consideration as well.

Q. So, let's shift gears a little bit and turn to the next real-world fact that was on your earliest list. Can you tell the jury about the next factor you analyzed? And in particular I'm talking about Mr. Logan's efforts to commercialize the technology that underlies the patents in this case.

A. Yeah. And we don't need to take too much time with this. We've seen the evidence that's been presented, is that Mr. Logan and his company attempted to commercialize a product that contained the teachings of the patent-in-suit and he wasn't successful and he ultimately had to give up on those efforts. And at the hypothetical negotiation, the negotiating parties would know that information.

Q. And, so, on the screen is Defendant's Exhibit 50; and why did you look at this document in connection with that particular point?

A. Well, this is where the board of directors basically wound down or shut down the company that was attempting to make a product that contained the teachings of the patents-in-suit.

And you can see it says in the middle there Personal Audio is "unable to create a viable business, has no success promoting its revised business plan, cannot achieve revenue, let alone profit." So, that's what the board of directors were saying about those efforts; so, it's -- you know, it was an unfortunate situation where the company was not able to commercialize a product.

Q. Okay. And, Dr. Ugone, this is actually a couple of years before the hypothetical negotiation; so, what's the importance of this to the hypothetical negotiation, if any?

A. Well, if you have two sides negotiating a license to the patent, here's one way to think about it, that one of the sides has attempted to commercialize a product, was not successful.

The other side would be in the process of commercializing a product but both sides would know what it would take to commercialize the product and that the patent holder has attempted to commercialize the product, had failed at that and, so, they would sort of know what efforts are going to be required to commercialize a product and that would be part of the negotiations at the hypothetical negotiation.

Q. Would that involve consideration of any business risks?

A. Oh, yes, it would, because as we see here, there was a business risk, that this company had been unsuccessful.

Q. So, let's move on and talk a little bit about the economic circumstances in 2001 when Apple introduced the iPod and around the time of the hypothetical negotiation that you're talking about.

So -- and this is a lot of text on this slide. However, the real question is: What was the economic climate and what type of business risks would both parties to the negotiation have been looking at in considering a royalty?

A. You know, if we all think back to 2001, it was a very difficult time period. The Internet bubble had burst. Companies were having -- especially high-tech companies were having a very difficult time. Competitors were reducing their R&D spending because there were losses that were being made. We were in a recession, right around the same period of time as the hypothetical negotiation. So, it's sort of like -- think about the economic environment in which the negotiations were taking place. And, so, what I'm trying to do there in the very beginning in the "economic environment" is to give you the flavor of that so you can have a sense of that. But the Internet bubble had burst, and we were in recession in the overall economy.

Then you get into more particulars for Personal Audio and Apple, and Personal Audio would be known to have been unable to commercialize an invention embodying the teachings of the patent-in-suit. They had gone out of business. They were winding down their audio initiatives and focusing on video. So, that was what was going on on the Personal Audio side.

And on the Apple side it's kind of an interesting set of circumstances, and we've heard some testimony on this from Mr. Fadell and Mr. Ng. But Apple was a large company, a Fortune 500 company. They had operating losses in 2001, and there was this sort of divergence of opinion that I think the people -- and I think it was Mr. Fadell that said he thought that the iPod would be a critically acclaimed product but he wasn't quite sure about whether it would be a commercial success.

But clearly within Apple they had confidence that they could make it into a commercial success, but let's just say analysts out in the marketplace didn't necessarily share that view in terms of Apple's effort. So, a lot of people out in the marketplace thought there was a big risk in terms of what Apple was doing, especially in this economic environment.

Q. Now, your opinion of a 5 million-dollar ceiling for the royalty in this case, based on the evidence you've reviewed, do you believe that Apple would have had the ability to pay $5 million at that time if that was the result of a hypothetical negotiation?

A. Yes, they could have paid the $5 million. They could have either paid it in a lump-sum amount, a 5-million-dollar payment; or if it was required, they could have structured sort of installment payments. But the point is that the payments would not have gone above the $5 million in aggregate.

Q. So, let's go ahead and turn to the last real-world fact that was on your list from before. And could you summarize for the jury the value indicators related to the patents-in-suit?

A. And again what we're trying to do is kind of in a sense triangulate to what would be the outcome of a hypothetical negotiation between prudent and reasonable negotiators. And we talked about one consideration being the two Apple licenses that we discussed and how those would come into play. But there was also the sale of the playlist patent that occurred at an auction, and there was also the offer to sell the Personal Audio patent portfolio to Concert Technology. So, we're going to talk about those, too.
Q. Okay. So, we will turn to the auction of the playlist patent; but briefly can you explain why these indicators are relevant from an economic perspective?
A. Well, if we take -- just go right to Number 3. That deals with the '076 patent; so, that's directly relevant, an offer to sell that.
It was also a fixed sale price; so, that's another important consideration.
And my understanding from Dr. Wicker is that the playlist patent had a similar or complementary technology to the patents in dispute here and there was a market transaction. So, there actually was an auction --
Q. So, Dr. Ugone, you're getting ahead of me. I'm going to go ahead and go to the next slide. You're talking about the playlist patent and the auction.

First of all, tell the jury what the playlist patent is.
A. Yes. So, according to Mr. Logan, the playlist patent covered methods for creating, distributing, and managing playlists; and it's complementary to Personal Audio patent portfolio, so, what -- what includes one of the patents-in-suit. So, that's why it's relevant to look at it.
Q. Okay. And that playlist patent was Defendant's Exhibit 169; is that right?
A. I believe that to be true, yes.
Q. Okay. Did you make any other determination to see if the playlist patent was comparable to the technology of the patents-in-suit?
A. Well, that's where I had discussions with Dr. Wicker. So, I had gotten a little ahead of you, yes.
Q. Okay. So, how were you able to determine a value for the playlist patent?
A. Well, here's what's interesting. I did not determine a value; the market determined a value. There was an auction for this patent. There were bidders for the patent. There was actually a transaction at a certain amount where someone purchased this patent. So, it was a market-determined price for the purchase of the patent. It wasn't a license agreement; it was a purchase

of a patent.
Q. Okay. Who was the auctioneer?
A. A company called "Ocean Tomo." They're known for conducting patent auctions.
Q. Okay. Can you explain a little bit more about that process?
A. Well, what they do is they actually set up the environment for the auction; and they bring the buyers and sellers together. So, they sort of facilitate it; and then there is actually bidders on the patent until it gets to above a certain price where the owner says, "If it's above that price, I will sell." But the bidding keeps going on until you get to a point where nobody wants to bid any more, and then it's sold.
Q. Okay. And is it your understanding that the playlist patent, in fact, sold at the Ocean Tomo auction?
A. Yes.
Q. Okay.
MS. HUNSAKER: Mr. Barnes, could you pull up Defendant's Exhibit 46, please?
And if we could blow that up to read it a little bit better.
BY MS. HUNSAKER:
Q. Can you tell us what Defendant's Exhibit 46 is?
A. Well, this was an email to Mr. Logan; and you can

see in the first line it says, "Congratulations on the sale of your consigned Lot Number 12B at our Spring 2008 auction held on April 2nd, 2008. Your lot transacted for a final bid price of $400,000."

Q. And is that your understanding of what the playlist patent sold for at the Ocean Tomo auction?

A. Yes.

Q. Now, in terms of the --

MS. HUNSAKER: Mr. Barnes, if we could bring up the next one.

BY MS. HUNSAKER:

Q. What do we know about the 400-thousand-dollar sale price of the playlist patent from the inventors in this case?

A. Well, there was deposition testimony by Mr. Call -- and I think he and I are in agreement. I was talking about sort of a market price by bidders ultimately bidding to the 400,000. But he received a question in deposition saying, "Okay. Would you agree that $400,000 was the fair market value of the playlist patent?"

And he answers, "You know, there were a good number of people bidding on it. That's where the bidding ended up. I guess what I thought it's worth doesn't count very much" -- where "he" thought -- "so, that's what a free market exchange determined was the value of it."

So, I stumbled a little bit in there; but the whole point he -- as you know, all sellers have higher hopes of getting as much money as they can but prices are what's determined in the marketplace and bidders bid up to 400,000 and they stopped and that's where the transaction took place.

Q. Okay. So, we're talking about a purchase of a patent; but in the issue that we're addressing in this case, we're talking about the license. So, what's more valuable -- to license a patent or to purchase it?

A. Well, actually the ownership of a patent -- think about it this way: Would you pay more to buy a patent, or would you pay more to license the patent? Now, if you buy the patent, you actually get ownership rights; and, frankly, you could turn around and license it to others. So, it's more costly to buy a patent than to pay the royalty fees on the patent. Kind of like renting a house versus if you were to buy the house, that would be a good analogy.

Q. So, ultimately what's the significance of a 400,000-dollar sale price of the playlist patent to the issues in this case?

A. Well, so, that's the sale price for somebody that bought the patent and, so, that tells you that it's likely that for this patent a licensing rate would be less than the 400,000.

Q. Okay. Let's shift gears a little bit and talk about the negotiations between Mr. Logan and Concert Technology. So, first of all, did you assist in preparing this timeline summarizing some of the correspondence between Mr. Logan and Concert Technology?

A. Yes. So, this is a summary of the underlying documentation concerning the timeline of the negotiations.

Q. Okay. And, so, before we go into some of the details on this, can you just tell us a little bit about what we know about Concert Technology?

A. Well, Concert Technology is a company that acquires licenses to get a portfolio and then try to license them themselves.

Q. Okay. And did they also have some products that they offered?

A. I don't believe they had any products. They were licensing patents. That's my understanding.

Q. So, if we look at -- excuse me just a moment.

If we look at the timeline, I notice that on the left-hand side is 2006 and on the right-hand side is 2008. Do you see that?

A. Yes, I do.
Q. Okay. And is that generally the time frame that these negotiations occurred?
A. Yes. So, it was roughly in the August, 2006, time period through mid 2008, so, roughly over a two-year period.
Q. Okay.
MS. HUNSAKER: Mr. Barnes, could we bring up Defendant's Exhibit 322, please?
BY MS. HUNSAKER:
Q. Do you see DX 322, and generally does this appear to be a string of emails between Mr. Logan and a Mr. Farrelly?
A. Yes.
Q. And who is Mr. Farrelly?
A. He is someone at Concert Technology actually.
Q. Okay.
MS. HUNSAKER: Now, why don't we turn to the last page of this. In email strings, a lot of times the first correspondence will appear printed on the last page. So, can we take a look at page 5 of DX 322?
BY MS. HUNSAKER:
Q. Now, what does this particular email represent in the context of the negotiations between Mr. Logan and Concert?

A. The easiest way I described this -- and there are some pleasantries and introductions at the beginning, but basically it's a contact between Mr. Farrelly and Mr. Logan inquiring about certain patents that Concert Technology would be interested in.
Q. Okay. And if you look down, the third paragraph of this email.
MS. HUNSAKER: Sorry. If we could highlight the date.
BY MS. HUNSAKER:
Q. When was this?
A. August 16, 2006.
Q. And then the third paragraph down, it mentions the '076 patent and the pending application. Do you see that?
A. Yes, I do.
Q. So, what was Mr. Farrelly writing to Mr. Logan about in this email?
A. Well, he's saying that there are certain patents that are owned by Mr. Logan that they would be interested in discussing for a possible transaction or purchase.
Q. Okay. Is that what he says in the first sentence of the third paragraph there?
A. Yes.
Q. And going on down to the last sentence or the last

clause of that, he references asking whether Mr. Logan and his co-inventors "are amenable to entertaining offers for this intellectual property"; is that right?
A. He's communicating that question, yes.
Q. Okay.
MS. HUNSAKER: So, if we could go a little bit further in the email string that is in Defendant's Exhibit 322, to page 4.
And pull up the August 31st email from Mr. Farrelly to Mr. Logan.
BY MS. HUNSAKER:
Q. Can you describe what's going on there?
A. Well, so, this occurs a couple of weeks later, August 31st, 2006; and Mr. Farrelly is contacting Mr. Logan again and is saying, "I just wanted to check in with you and find out if you might have some time today or tomorrow when we could discuss the patents that our firm is interested in acquiring."
So, he's establishing that contact again.
Q. Okay. Then the remainder of this exhibit, they set up the call; and there -- when we looked at the timeline, it describes some of the preliminary discussions that happened in the fall of 2006; is that right?
A. That's correct.

MS. HUNSAKER: Could we go ahead and bring up Defendant's Exhibit 334 now?
BY MS. HUNSAKER:
Q. So, Dr. Ugone, could you take a look at DX 334; and do you recognize this?
A. Yes, I do.
Q. And generally could you describe it for the jury?
A. This is another contact from Mr. Farrelly to Mr. Logan. And it says, "Thanks for the note. I apologize for the delay in getting back to you." He was out of town; so, he's just doing some introductions.
And then he says, "In answer to your question, we have met a few patent valuation and broker firms that might be able to help you get your portfolio organized and ready to sell." So, he discusses that a little bit.
And then he says -- and this is the important part, the first sentence of the third paragraph, "If you are amenable, though, we would like to meet with you first to evaluate the portfolio and make an offer."
Q. Now, if you go on to the second page of DX 334, there is an email from Mr. Farrelly to Mr. Logan in November of 2006. Do you see that?
A. Yes, I do.
Q. And what is he discussing with Mr. Logan in this email?

A. Well, he's really referencing also a prior communication; and Mr. Farrelly is saying to Mr. Logan, "Thought I would check in with you. We last talked in early October, and you indicated that you thought it would take about 6-8 weeks to complete a valuation of your respective portfolios."

And then he basically says, "I just wanted to get an update on your progress."

Q. Okay. And then at the very top of that page --

MS. HUNSAKER: And I believe we need to look at the bridge between pages 1 and 2.

BY MS. HUNSAKER:

Q. But this appears to be a response from Mr. Logan to Mr. Farrelly. Do you see that?

A. Right above that, yes.

Q. Okay. And what does Mr. Farrelly tell -- excuse me. What does Mr. Logan tell Mr. Farrelly in the second sentence of that email?

A. In the second sentence it says, "I'm actually in the process of trying to hire someone to help me get my patent portfolio organized and ready to sell."

Q. Okay.

MS. HUNSAKER: So, let me ask you to pull up DX 345, please, Mr. Barnes.

*

BY MS. HUNSAKER:

Q. So, Dr. Ugone, do you recognize Defendant's Exhibit 345 as another email chain between Mr. Logan and Mr. Farrelly of Concert?

A. Yes, I do.

Q. So, pulling up again the pages that bridged 1 and 2 of this Exhibit 345, this appears to be a December 9th, 2007, email, again between Mr. Logan and Mr. Farrelly. Do you see that?

A. Yes, that's correct.

Q. And in the last sentence of that first paragraph, what is Mr. Farrelly telling Mr. Logan?

A. If I'm with you on the paragraph you want me to look at, which I'm familiar with, it says, "If you are still interested in selling, I'm sure I can get you a formal offer from our team."

Q. Okay. Now, if you look up to the next email in the string, Mr. Logan responds to Mr. Farrelly; is that right?

A. Yes.

MS. HUNSAKER: Actually it's a little bit lower, Mr. Barnes.

Thank you.

BY MS. HUNSAKER:

Q. Now, this appears to be a response from Mr. Logan to Mr. Farrelly. And can you read what it says in the second sentence of this part of Exhibit DX 345?

A. So, Mr. Logan is saying to Mr. Farrelly, "Now we are engaging a small firm to do a patent valuation study to really see who may be violating the patent."

And then he goes on to say (reading) in February we may have a better idea of what we're going to do.

Q. Okay.

A. I was paraphrasing in that second --

Q. Thank you.

At the very top of Defendant's Exhibit 345, it looks like Mr. Farrelly checks in with Mr. Logan in February and then -- at the very top?

A. Sure. So, Mr. Farrelly says to Mr. Logan, "Just thought I would check in with you. I know that you expected to have your patent valuation analysis completed by February. If that work has been finalized and you have a firm idea of what you would like to do with your portfolio, please let us know."

Q. Okay. Thank you.

MS. HUNSAKER: Now, Mr. Barnes, if you could pull up Defendant's Exhibit 337, please.

BY MS. HUNSAKER:

Q. Dr. Ugone, DX 337 appears to be another email to

Mr. Logan from Mr. Farrelly on April 4th, 2008. Do you see that?
A. Yes, I do.
Q. And Mr. Farrelly starts out saying, "Congratulations on selling your lot." Do you believe he's referring to the playlist patent auction that we discussed previously?
A. Yes. And it does say "Subject: Lot 12B"; and I think we saw that in a previous email as well.
Q. Okay. If you could go down to the last paragraph, take a look at the last sentence of the last paragraph there. What is Mr. Farrelly telling Mr. Logan there?
A. The last sentence says, "I think that if you have other assets to sell, we could probably come to a mutually beneficial arrangement."
Q. Okay. Thank you.
MS. HUNSAKER: Mr. Barnes, could you pull up Defendant's Exhibit 321, please?
BY MS. HUNSAKER:
Q. Dr. Ugone, does Exhibit 321 appear to be another communication between Mr. Farrelly and Mr. Logan?
A. Yes.
Q. And if you could turn to the fourth page of DX 321, it appears to be another April email to Mr. Logan from Mr. Farrelly. Do you see that?

A. I do.
Q. And what is the purpose of this email?
A. Well, it says -- Mr. Farrelly is saying to Mr. Logan, "Good to talk with you today. As discussed, attached is our mutual NDA." And then it goes on from there, but it's the concept that attached is an NDA.
Q. Okay. And if you scroll up to the response in this email -- and again this one bridges pages 3 and 4 -- did Mr. Logan respond to Mr. Farrelly?
A. Yes. The first sentence says "The NDA looks okay."
Q. Okay. And if you look down at the last paragraph before the sign-off, does Mr. Logan tell Mr. Farrelly anything regarding patents that he's potentially interested in doing a deal with Concert on?
A. It says, "We are still interested in discussing a deal with the Personal Audio patent family." So, that's the -- yeah, what's been highlighted on the screen there.
Q. And then you see the sentence that says, "But for reference"?
A. I'm sorry. Could you -- oh, yes. Yes. "But for reference, the patents that have issued in this set are described here." And there's what appears to be a link.
Q. Okay. And then the final sentence of that paragraph says (reading) the pending continuations being

written now are quite interesting.
Do you see that?
A. Yes, I do.
Q. Okay. Do you have an understanding whether that refers to the '178 patent?
A. Yes. That's my understanding.
Q. And then finally if you could go to page 2 of Defendant's Exhibit 321. It looks like Mr. Farrelly responds to Mr. Logan on April 21st, 2008. Do you see that?
A. Yes, I do.
Q. And in the first sentence, again he's referring to "Glad to hear that the NDA is acceptable"; is that correct?
A. Yes.
Q. Okay. And then if you look down at the paragraph that begins "As for Gotuit Media" --
A. Yes.
Q. -- what does Mr. Farrelly tell Mr. Logan in the second sentence of that paragraph?
A. "However, we are interested in pursuing opportunities with the Personal Audio portfolio."
Q. Okay. Now, if we scroll down a little bit further in Defendant's Exhibit 321, he says at the bottom, "Here is my understanding of the family"; and he's talking

about patent families.
A. Yes.
Q. And under Number 3, does that list the '076 patent?
A. Yes, it does.
Q. And under 3A, it begins with an 09/781,546. Is it your understanding that that is the application for the '178 patent?
A. Yes.
THE COURT: Counsel, we're going to break for lunch.
Ladies and gentlemen, I'll ask you to be back at 1:00.
(The jury exits the courtroom, 11:58 a.m.)
THE COURT: We'll be in recess until 1:00.
(Recess, 11:58 a.m. to 1:00 p.m.)
(Open court, all parties present, jury present.)
THE COURT: Ms. Hunsaker, please continue.
MS. HUNSAKER: Thank you.
BY MS. HUNSAKER:
Q. Welcome back, Dr. Ugone. At the break we had finished talking about some correspondence in April, 2008. Do you recall that?
A. Yes.

Q. Okay. And, so, just orienting back to the timeline --

MS. HUNSAKER: Mr. Barnes, if you could please bring up Defendant's Exhibit 136, please.

BY MS. HUNSAKER:

Q. Dr. Ugone, do you have DX 136 in front of you?

A. I do.

Q. And is this another email string that continued the discussions between Mr. Logan and Concert Technology?

A. Yes.

Q. Let me have you take a look at page 2 of Defendant's Exhibit 136, please.

A. I'm there.

Q. Okay. And actually before we talk about what this says, can you tell the ladies and gentlemen of the jury what the date of this email exchange is as reflected on the first page of the exhibit?

A. This is in the June 2nd, June 3rd time frame. The email chain is in that time period, over those couple of days.

Q. Okay. Very good. Now if you could please go to the second page of DX 136.

A. Okay.

Q. This appears to be an email from Mr. Logan to Mr. Gene Farrelly of Concert; is that correct?

A. Yes.
Q. Okay. And can you describe to us what Mr. Logan says in the first paragraph of this email?
A. Well, he says, "Nice talking with you today" -- I'm sorry. Are you on the second page?
Q. Yes.
A. Okay. Says, "Nice talking with you today. Per that discussion, here is the Preliminary Amendment to the '546 application whereby we canceled the existing 33 claims and replaced them with 29 new claims."
Q. The '546 application, is that the one that we discussed related to the '178 patent-in-suit?
A. That's correct.
Q. Okay. And how about the second paragraph, what does Mr. Logan tell Mr. Farrelly there?
A. He says, "Please let me know when it's appropriate to send over the claims chart we did on this regarding Apple. And I will let you know what Charlie Call thinks of the connections between the patents."
Q. Okay. Thank you.
MS. HUNSAKER: Mr. Barnes, could you please shift to Demonstrative 830?
BY MS. HUNSAKER:
Q. Did Mr. Logan also provide some testimony in the trial here with respect to consideration of Apple and the

Concert negotiations?
A. Yes, he did.
Q. Okay. And what did Mr. Logan say?
A. Well, we have the transcript testimony up here.
He was asked a question, "So, let's just be very clear. In the summer of 2008 when you had the $5 million discussion with Mr. Farrelly, you suspected that Apple was using your patents, correct?
"Answer: Yes, we did.
"Question: So, it wasn't like you discovered after you made that offer that Apple might have been using your patents, correct?
"Answer: That is correct."
Q. Okay. Thank you, Dr. Ugone.
MS. HUNSAKER: Mr. Barnes, could you please pull up DX 137 now?
BY MS. HUNSAKER:
Q. So, Dr. Ugone, the next exhibit that we have on the screen is Defendant's Exhibit 137. And starting at the bottom of this email string, can you tell us, first of all, what this is and what date it is?
A. So, the very bottom email in the email chain is July 15th, 2008; and again it's an email from Mr. Farrelly to Mr. Logan.
Q. Okay.

MS. HUNSAKER: Let's get that up there.

BY MS. HUNSAKER:

Q. Okay. And what is the date again of this email?

A. July 15th, 2008.

Q. And, so, is this after the email that we just looked at in which Mr. Logan was discussing Apple with Mr. Farrelly?

A. That's correct.

Q. Okay. And can you tell us what Mr. Farrelly tells Mr. Logan in this email?

A. He says, "We have completed our due diligence and would like to present you with an offer."

Q. Okay. And did Mr. Logan reply to this?

A. Yes, he did.

Q. Okay. And what did Mr. Logan say in his reply -- actually down in the middle.

A. Well, he basically says that he's on Cape Cod right now but he could step out and give him a call a little bit later.

Q. Okay.

MS. HUNSAKER: And if we could go up to the top part of the email, please.

BY MS. HUNSAKER:

Q. Okay. And what date is this email?

A. So, now we're to July 16th; so, that's literally the next day.

Q. Okay. And what does this email reflect?

A. Well, this is where Mr. Farrelly is saying to Mr. Logan, in the third paragraph, he says, "At this point in time, I am only authorized to make my offer over the phone." And, so, he says basically that he has a verbal offer that he wants to discuss with Mr. Logan.

Q. Okay. And if you look at the very first sentence of that email string, does it appear that he's already spoken to Mr. Logan today?

A. Yes. He says, "Thanks again for the call today."

Q. Okay. Referring back again to the last paragraph of this --

MS. HUNSAKER: No, I'm sorry. Mr. Barnes, the last paragraph in that string that was already up.

BY MS. HUNSAKER:

Q. What does he say there in the last sentence of the last paragraph?

A. "Our CEO is out-of-pocket for a few days, but when he returns, I will tell him that you have indicated your desire to have our offer more formalized in writing (i.e. via email), and with his approval, I will send you a note accordingly."

Q. Okay. Thank you, Dr. Ugone. That was July 16th, 2008.

MS. HUNSAKER: Mr. Barnes, could you please now pull up Defendant's Exhibit 51?

And if we can highlight the title in the first paragraph of this document.

BY MS. HUNSAKER:

Q. Can you tell us what DX 51 is?

A. This appears to be some meeting notes that Mr. Logan made after his meeting with Mr. Stan Fry of Concert Technology.

Q. And is this shortly after the email we just looked at in which Concert made an offer to Mr. Logan?

A. Yes. So, the date of this memorandum is July 30th, 2008.

Q. Now, focusing a little bit further down in DX 51, let's take a look starting at about the fourth through sixth paragraph. If you could, describe to the ladies and gentlemen of the jury what this document reflects.

A. Well, Mr. Logan is memorializing some of his thoughts and the nature of the conversation with Mr. Fry; so, that's my read on what is going on in this document.

Q. So, in the first paragraph he notes that -- Mr. Logan notes that (reading) Concert has 20 people working there, some in patent licensing, and others on the R&D side.

Do you see that?

A. That's correct, yes.
Q. The first sentence of the next paragraph, he says, "The business model of Concert does not lend itself to a partial or contingent sale." Do you see that?
A. Yes, I do.
Q. And then, finally, in the sixth paragraph, which is the last part highlighted up there, what does Mr. Logan write in this memo regarding his meeting with Stan Fry of Concert?
A. He says, "In any case, I told Stan our number for the PA patents was $5 million."
Q. And is this the document reflecting the offer to sell the Personal Audio patents to Concert for $5 million that you've talked about previously in your testimony?
A. That's correct.
MS. HUNSAKER: So, Mr. Barnes, if you could now pull up DX 134, please.
BY MS. HUNSAKER:
Q. Dr. Ugone, do you have Defendant's Exhibit 134 in front of you?
A. I do.
Q. And could you tell us what this is?
A. This is an email from Mr. Farrelly to Mr. Logan on July 31st.
Q. Okay. So, this is --

A. And he's having contact with Mr. Logan concerning the meeting that Mr. Logan had with Mr. Fry earlier in the week.
Q. Okay. Let's just focus in a little bit on the first paragraph. What does he say there in the second and third sentences?
A. He was saying he was glad that Mr. Logan could meet with the chairman, Mr. Fry, and it sounded like they had a productive meeting.
Q. And then in the third paragraph, it appears that he's attaching a draft version of a purchase agreement. Do you see that?
A. Yes. He says, "Attached is a draft version of an agreement for the purchase of your Personal Audio portfolio."
Q. And what does he note in the next sentence?
A. "Please note that in the agreement we have specifically identified the patents that we believe to be part of this portfolio."
Q. So, then focusing down in the second to last paragraph of DX 134, what does this part of the exhibit reflect?
A. Well, he says to Mr. Logan, "I know that you and our chairman had some discussions on valuation. As such, I have not included any formal amount for our offer in

the attached draft agreement."
And, so, then he says (reading) I want to make sure that we're talking about the same set of patents before we finalize any valuation discussions.
Q. Okay. Thank you, Dr. Ugone.
MS. HUNSAKER: Mr. Barnes, if you could bring up Defendant's Exhibit 135, please.
BY MS. HUNSAKER:
Q. And if we just look up at the title of this agreement, you see it says, "Intellectual Property Purchase and Sale Agreement"?
A. Yes.
Q. And was this the draft agreement that appears to have been attached to the previous email?
A. That's correct.
Q. And I believe this has already been shown and testified to, but let's look at the patents that are a little bit further down in this particular agreement. And the third one down appears to reflect the '076 patent; is that correct?
A. That's correct. So, the third column from the left in the third row is the '076 patent.
Q. Okay. And we've previously discussed that the '546 application, which is two rows down, is the application that resulted in the '178 patent; is that

correct?
A. That's correct.
MS. HUNSAKER: Okay. Mr. Barnes, if you could please pull up Defendant's Exhibit 41.
BY MS. HUNSAKER:
Q. So, Dr. Ugone, could you please describe what DX 41 is?
A. Okay. I'm just turning it to the exhibit now. I'm sorry. 041?
Q. Yes.
A. So, at the very bottom of it -- so, it's an email chain. So, you start at the bottom. And Mr. Farrelly is again writing to Mr. Logan.
Q. And what's the date?
A. The date of this would be August 20th, 2008.
Q. Okay. And what does Mr. Farrelly tell Mr. Logan in the first couple of paragraphs of this exhibit?
A. Well, Mr. Farrelly says, "After your meeting with our chairman last month, we went back and spent some more time reviewing the Personal Audio portfolio. At this point in time, we feel as though the offer we extended to you is reasonable."
But then he goes on to say, "I understand from your conversations with our chairman that you were looking for a more substantial offer. So, it appears as

though we are at an impasse."

MS. HUNSAKER: Mr. Barnes, if you could please bring up the Demonstrative 827, please.

BY MS. HUNSAKER:

Q. So, Dr. Ugone, in coming to form your opinions in this case, did you consider all of the exhibits that we just went through and which are reflected on the timeline that is Demonstrative 827?

A. Yes. That would be over the mid 2006 to mid 2008 time period.

Q. Okay.

MS. HUNSAKER: Your Honor, at this time I would like to move DDX 827 in as a 1006 summary.

MR. SCHUTZ: It's just a timeline, your Honor. The underlying documents are in; and, so, this isn't a case summarizing voluminous documents. They're all in; and, so, I don't think it's a summary.

THE COURT: Okay. Any objection to having it in, as we have on some of the other ones that the experts have come up with, basically an outline of what their thoughts are or opinions are, the jury has the documents and the facts to look at?

MR. SCHUTZ: If we have some similar ones in --

THE COURT: Right. Both sides have already had some of those in.

Any problem with that, Ms. Hunsaker?

MS. HUNSAKER: No, your Honor.

THE COURT: Okay. Again, ladies and gentlemen, you're going to have a number of these demonstratives and again I'll instruct you these are what these various experts have summarized and put together and it basically states their opinion. You're going to have to decide the underlying facts.

And if you are to decide you just didn't agree with how they summarized it, well, then you just didn't agree. But it otherwise becomes very, very difficult for you to remember what they said and see what they said, especially when the lawyers are arguing about it. So, I'm going to allow it for that limited purpose on them.

And we'll identify which ones those are when you take them back to the jury room.

Go ahead, ma'am.

MS. HUNSAKER: Thank you, your Honor.

Mr. Barnes, could we go to Demonstrative 827, please?

How about 829?

BY MS. HUNSAKER:

Q. Okay. Now, Dr. Ugone, the negotiations that we've just talked about between Mr. Logan and Concert

Technology, those were for the sale of the Personal Audio patents rather than for a nonexclusive license; is that correct?
A. That's correct.
Q. And can you explain how the offer to sell these patents is relevant to the amount of a license?
A. Well, the hypothetical negotiation would have been for a license to the patents we've been talking about, not to purchase the patents we've been talking about. These discussions that we've been going through have to do with the purchase, and you would expect that the purchase price would be higher than the licensing rate. And, so, that's why it was relevant that this is a higher number than what you would probably expect out of a hypothetical negotiation.
Q. We also talked about the date of this offer being in 2008. Could you explain how to evaluate that in the context of a hypothetical negotiation in either 2001 or 2009?
A. So, these discussions occurred over the 2006 to 2008 time period. The 5-million-dollar figure was given in 2008, and the hypothetical negotiation is 2001. So, the question is how is that helpful to us.
Well, we did see through the documentation that Mr. Logan had his suspicions about Apple, at least

what he was thinking in terms of Apple using his intellectual property. And we've seen from some of the underlying data that the amount of sales, for example, of the iPod was -- it was commercially successful at that point in time. Whereas, at the time of the hypothetical negotiation, there would have been a much greater degree of uncertainty about the future success of the iPod.

And, so, that way, in a sense, it would be -- if you rolled that number back, it would be a conservative rolling back of that number, given what had transpired in the intervening years.

Q. And is that why you refer to the 5-million-dollar number as a ceiling?

A. As a "no greater than," yes.

Q. Okay. So, based upon all of your testimony up to this point, what conclusions have you reached based on the value indicators that we've looked at today?

A. All right. So, taking into account everything I've looked at, the various contributions of the parties and what has led to -- you know, the R&D that's taken place, the marketing and so forth, the strategies of getting a product to the marketplace -- I don't want to separate all of that. So, there is all of that information plus there's all the value indicators, the numbers and the comparable licenses and the sales that we've seen with the playlist patent and the offer for -- by Mr. Logan to sell for $5 million. I put all of that together, and that's why my opinion is at the time of the hypothetical negotiation, they would have reached an agreement for a fully paid-up freedom-to-operate license no greater than $5 million. That's the basis of my opinion.

Q. Okay. Thank you, Dr. Ugone.

So, we're going to shift gears just a little bit; and we're coming close to winding up. But I'd like to turn to your specific evaluation of Mr. Nawrocki's opinion.

MS. HUNSAKER: Mr. Barnes, if you could go to Demonstrative 833, please.

BY MS. HUNSAKER:

Q. Now, is Mr. Nawrocki's opinion regarding Personal Audio's claimed damages consistent with the real-world facts that you have discussed today?

A. I do not find his opinion to be consistent with the real-world facts that I've discussed, and they fall into two categories. There's the numbers that we've been talking about in this chart on the real-world facts; and then there's all the other kind of qualitative explanations I've given for the reasons for the success of the iPod classic, nano, and mini. And, so, I find his number to be way overstated in light of the factors that I considered and used as an input into my opinion.

Q. Okay. So, let's talk a little bit about why you think that Mr. Nawrocki's royalty conclusion is too high. So, do you recall Mr. Nawrocki's testimony with certain percentages?

A. Yes, I do.

Q. Okay. And what is your opinion regarding Mr. Nawrocki's allocation to those various groups?

A. And just to help orient us, remember he took, on the far left, the average selling price times a profit margin; and then he did these multiplications by these percentages to ultimately get to what he claimed to be the profits associated with the claimed patented features.

And what I remember from Mr. Nawrocki's testimony is that if you look at that middle box there, that he gave a series of percentages when he did those multiplications but he didn't have any anchor for those percentages. He said he was looking at certain source documentation, but he wasn't able to tie those numbers to any source documents.

Q. And you studied the documents in this case and you've studied Mr. Nawrocki's report and in any of those did you see any factual anchor for the percentages that

Mr. Nawrocki allocated to each of the boxes?
A. Right. So, not in that section there where it says, "No Support For Claimed Percentages." I saw no direct support for those numbers in the documentation.
Q. Okay. Now, we'll come back to the allocations to playlists in the green box; but let me just ask you a couple of questions about the resulting numbers that Mr. Nawrocki got.
What did he do with the amount of profit that he attributed to the patented invention?
A. Well, if you recall, he did all of these multiplications, then got a range and took something close to the midpoint of the range and said that the profits attributable to the patents-in-suit here was roughly 90 cents a unit. That was his opinion.
And then he said the royalty rate is 90 cents. So, he took the profits that he said was attributable to the patents-in-suit and said that will be the amount of the royalty. And he took all 100 percent of that and said that that would be the royalty that negotiators would have agreed upon at the hypothetical negotiation.
Q. So, under Mr. Nawrocki's approach, Mr. Logan and Apple, they didn't share or somehow divide the profits that were supposedly attributable to the patent; is that right?

A. That's correct.
Q. And what's the matter with that?
A. Well, the way I think about it is it's almost like Mr. Nawrocki had only done half of the analysis. He had done his allocations all of the way down to the 90 cents; but I've shown that there's many reasons why the sales of the iPod were as high as they were, all of the contributions of Apple in terms of the R&D or the pricing strategy or the advertising. And all of that caused that ramp-up in sales.
Well, it's almost like as soon as Mr. Nawrocki was taking that 90 cents and applying it to all those units, then that implicitly is ignoring the contribution to Apple -- of those sales. And that's a fundamental difference of agreement to have with Mr. Nawrocki, that Apple contributed to those unit sales but in a sense, in Mr. Nawrocki's hypothetical negotiation, Apple doesn't get any credit for that contribution.
Q. So, are there any other reasons why you disagree with Mr. Nawrocki's royalty rate figures?
A. Well, there's a couple of other reasons. There's -- over time he had given the 90-cents opinion. Then in the March, 2009, he had given the dollar-thirty opinion as to a per-unit royalty rate. And what's interesting is that that second opinion, for the

dollar-thirty, was just for the '178 patent if the '076 was found not to infringe or if it's invalid. So, he's only talking about the '178.

But that opinion was a dollar-thirty; so, it had gone up from 90 cents to a dollar-thirty and for, you know, a situation where we would be able to see all of the contributions of Apple to the success of the product at that point.

And also the reason why I'm saying that is we know all the R&D, all the changes in the products, all the increases in the size of the hard drive, all the additional features; but he actually has the royalty rate going up when you would expect the contribution of the patents to the product would actually be getting smaller, given the increases in the features of the products. So, in my mind that was a contradiction, an inconsistency.

Q. So, let's talk about the green box over on the right-hand side of this chart and, in particular, the allocation that Mr. Nawrocki made to playlists. Do you recall that?

A. Yes.

Q. Now, Mr. Nawrocki relied on certain surveys in coming to those percentages; is that correct?

A. That's correct.

Q. Okay. Now, did you consider any of the

circumstances surrounding those surveys in reaching your conclusions about Mr. Nawrocki's opinions?
A. Well, I was aware of, for example, Dr. Peterson's survey, if that's what you're asking, yes.
Q. Yes. Okay. So, do you understand the purpose of Mr. Peterson's surveys?
A. He was trying to really kind of figure out -- there's what he did do and what he didn't do, but he was asking survey respondents questions about their use of, for example, the playlist feature.
Q. Okay. And did Dr. Peterson testify about what his survey did and did not mention?
A. Yes.
Q. Okay. So, I've called up Demonstrative 835. And is this some of the deposition testimony from Dr. Peterson that you relied on?
A. Yes.
Q. Okay. And can you tell us what this reflects?
A. Well, so, Dr. Peterson was asked a question in this deposition.
"Question: And, so, it's fair to say then, isn't it, that the results of the questionnaire that was administered over the Internet would not provide results that are specific to the patent claims of the Personal Audio patents; is that fair?

"Answer: Correct. The focus was on the playlist. It didn't go into anything in more detail."

Q. Would the same be true with respect to the Apple surveys regarding playlists?

A. Yes.

Q. Was there further testimony from Dr. Peterson that you relied on?

A. Yes. Here he was asked two more questions.

First question: "But the results would not distinguish between parts of playlists that were contributed by the Personal Audio patents as opposed to parts that were contributed by Apple, for example; is that correct?"

Answer: "That's correct."

Following question: "And the results of the Internet surveys would not distinguish between parts of the playlists that were contributed by the Personal Audio patents as opposed to, for example, what was already in the technological field before Personal Audio; is that correct?"

"Correct."

Q. And what's the significance of this testimony, to you?

A. Well, the easiest way to think about it is when I put all of this information together, he's not --

Dr. Peterson in his surveys was not measuring the incremental benefits associated with the patents in dispute in this courtroom.

Q. And would the Apple surveys relied upon have the same problems in this regard that Dr. Peterson's survey did?

A. That's correct.

Q. So, Dr. Ugone, there's a pretty big difference between your opinion in this case and Mr. Nawrocki's opinion in this case; is that right?

A. Yes.

Q. And as an economist, are you here to tell us that it's fair to do something like split the difference between those two numbers?

A. No. Mr. Nawrocki has given his per-unit running royalty rate opinion. When he multiplies that times the number of units that were sold of iPods, he gets about $84.4 million. I've tried to explain why I don't feel that that's correct. I've given all of the reasons of all of Apple's contributions. I've talked about all of the considerations that would be discussed by parties at a hypothetical negotiation and the concept of a freedom-to-operate license that had an aggregate amount attached to it of no greater than $5 million; and I've explained the justification for that, both through some

of the license agreements, some of the sales, the offer to sell, and the contributions of -- the relative contributions of the parties. Based on the totality of that, my opinion is that it's no more than $5 million.
Q. Okay. So, let's go back to where we started. And you told us that real-world facts matter. Do you recall that?
A. Yes.
Q. Okay. So, what are the key data points that you point to from the real world that shows where a reasonable royalty in this case would have come out?
A. All right. So, as I mentioned before, in a sense, what I'm trying to do is kind of triangulate on the value of the license, what the license royalty rate would have been. And, so, it's not just one piece of information; but we have two Apple comparable licenses. We have the playlist patent sale. We have the offer to sell the Personal Audio patent portfolio and then also keep in mind all of the other considerations that I had mentioned very early on in my testimony in terms of the contributions of the parties. So, it's really all of that together that leads to my opinion.
Q. Okay. And your opinion, in conclusion, Dr. Ugone, is what?
A. That there would have been a license agreement

agreed upon by the negotiators at the hypothetical negotiation for a freedom-to-operate license of an amount no greater than $5 million.

Q. Okay. Thank you, Dr. Ugone.

MS. HUNSAKER: Pass the witness.

MR. SCHUTZ: Your Honor, may I approach?

THE COURT: You may.

MR. SCHUTZ: Dr. Ugone, I might be asking you some questions about these.

THE WITNESS: All right. Thank you.

CROSS-EXAMINATION OF KEITH UGONE

BY MR. SCHUTZ:

Q. Good afternoon, Dr. Ugone.

A. Good afternoon.

Q. Prior to the start of this trial, you and I had never met, had we?

A. That's correct.

Q. I did learn something during your direct testimony today that you and I have something in common. We both have sons who are captains in the U.S. military.

A. Okay.

Q. Your son's a Marine. Mine's an Army Ranger. So, when this is all over and we're done butting heads --

A. We'll talk about it, yeah.

Q. And we are going to butt heads; but when we're done, we'll talk about that.

When you are trying to put together your opinion, is it fair to say that you'd rather have more information to sift through than less?

A. I think generally that people in my position would have -- like to have more information rather than less, as long as it's relevant information that bears on the problem being addressed, sure.

Q. You start with a whole bunch of information. You put it in a funnel or a filter and you keep weeding out stuff you don't consider and you get down to what you think are the core things to consider, right?

A. Within the spirit of your question, I'll agree, yes.

Q. Yeah. And, so, necessarily you're going to look at some stuff and say, "Nah, I'm not going to consider that. I'm not going to consider this, but this other stuff I'm going to consider," right?

A. I'm not going to disagree with you. I would just maybe say that rather than saying I'm not going to consider it, I may not put as much weight on it as other pieces of data.

Q. Do you think that there are some things that you did not consider that might be relevant to the issue of damages in this case?

A. I tried to do the best job that I could, and I've explained to the jury the vast majority of what I was relying upon and what formed my opinions.
Q. But would you concede, sir, that there could be some stuff out there that you just might have overlooked?
A. I don't know what that is. If you'd like to show me, that's fine.
Q. We'll get to that.
A. Yeah.
Q. All right. Now, are there some -- there are some areas where you agree with Mr. Nawrocki, right?
A. We're going to have to go through those.
Q. Okay. But before we do -- we're going to do that in just a second and I'm going to come back to this, but this whole issue of his analysis and slicing and dicing the numbers and getting down to a profit number -- and you said he allocated the entirety of the profits to Personal Audio, right?
A. Yes.
Q. And you have a problem with that, right?
A. Yes.
Q. Now, do you remember -- you've been sitting back here the whole trial, right?
A. Yes.
Q. Do you remember all the discussion about one of

the key things that went into making the iPod a success, according to Apple, was this small Toshiba hard drive, right?

A. That was a very important piece of hardware to put into the iPod, yes.

Q. Right. And that helped drive sales of this iPod and helped drive profits, right?

A. It was one of a number of attributes to the product when they developed the product and a core theme was a thousand songs in your pocket and that comes from, among other things, the Toshiba hard drive. So, I'm not going to disagree.

Q. Great. And --

A. But there are other considerations as well, is all I'm saying.

Q. Right, right. And Apple shared exactly zero -- zero -- of its profits with Toshiba, right?

A. I would never describe it how you just said that.

Q. Did they send any royalty checks to Toshiba? They just bought the hard drive, paid for the hard drive, made profits. Didn't share any of it with Toshiba, did they?

A. Toshiba set a market price for the hard drive. Apple clearly paid the market price. That left a profit with Toshiba. The market was determining what the allocation would be. So, that's why I'm saying I wouldn't say what you said.

Toshiba got a profit from the sale of incremental iPods, but it was through their sale of the hard drive to Apple and Toshiba was making a profit on the hard drive. That's the correct economic way to describe that. So, Toshiba was definitely sharing in the commercial success of the iPod.

Q. And Toshiba got paid for every unit sold, right?

A. Well, there was a transaction across a market. There was a physical good that was being transacted in a market.

Q. But Apple made additional profits because of that Toshiba hard drive, right?

A. You need to -- well, let's put it this way: That was an input into the iPod. So, just like any company -- any company hires labor. Any company buys -- a car -- a carmaker buys tires to put on the car, and then they sell it to another consumer. The whole point is there is a firm that collects resources -- you have to think about what firms do. Not every firm makes every single little item that goes into a product. Carmakers buy tires. They buy carburetors. There's like 2200 different suppliers to a carmaker. But what does a carmaker do? They bring all of those resources together, take the risk, and then sell a final product. That's just the way

the economic system works.
Q. And then make profits.
A. And then ultimately make profits because they're taking that risk.
Q. Right. But it's -- you're not saying that Personal Audio, for its contribution, should get none of the profits, are you?
A. What I'm saying is that they should get the value of the licensing agreement between a willing licensor and a willing licensee.
Q. But one way to do that is to try to determine what the profit that can be attributed to the patented invention is. That's an appropriate way to look at this, right?
A. Under certain circumstances.
Q. Right.
A. I didn't say in this circumstance. In some circumstances that could be appropriate.
Q. Right. I mean, you think it's a lump sum; and we're going to get into the per-unit issue in a minute.
But if per-unit royalties are an appropriate measure of damages, one way to calculate the amount of those is to start dividing, subdividing, and allocating profits, correct?
A. I want to be very careful. That can be done. I'm

not going to disagree with that. But you have to make sure the facts and circumstances warrant that sort of consideration.
Q. Now let's go to Plaintiff's Exhibit 789, which is in your book. You can look at it if you need to. But Mr. Nawrocki went through a lot of work calculating the number of units of the infringing products that have been sold, right?
A. Yes.
Q. And you have not -- at least I don't think I saw it in the report you wrote. You've not disagreed with that work on Mr. Nawrocki's part, have you?
A. I had my calculation of the number of units, and he had his. I don't remember any differences between the two.
Q. If there were differences, they were insubstantial. Is that a fair statement?
A. I would agree with that, yes.
Q. All right. And this is one of the documents -- Plaintiff's Exhibit 789 -- that Mr. Nawrocki used, right?
A. Yes.
Q. And then he summarized that in Plaintiff's Exhibit 1073, which I --
A. Give me one second to catch up.
Q. I mean, you can look at it up here; but you were

here when Mr. Nawrocki put this summary on the board, right?

A. Yes.

Q. And, again, at least for this part of what Mr. Nawrocki did, you have no issue with how he calculated the number of units sold by device by year, correct?

A. I don't recall any substantial differences between --

Q. So, we're okay with that, right?

A. Yes.

Q. All right.

MR. SCHUTZ: Your Honor, may I go into the well and set up the easel?

THE COURT: You may.

BY MR. SCHUTZ:

Q. Dr. Ugone, I'd like to ask you questions about this hypothetical negotiation. I mean, you've spent a lot of time talking about that; and as I understand it, you've got one way to illustrate that is with a table, right, a bargaining table with somebody on one side and somebody on the other side, right? (Illustrating.)

A. We've got a thin table there, but yes.

Q. My drawing is -- you know, I'm an engineer by training and I'm one of those patent lawyers like

Mr. Cordell is -- he's over there -- and when we go to parties, you know, people don't talk to us. Okay? But anyway -- I don't draw very well.

So, on the one side of the table, we've got the Logan Family Trust represented by Jim Logan, right?

A. Yes.

Q. And then he's negotiating with somebody on the other side of the table, right?

A. Yes.

Q. And the person he's negotiating with in these hypothetical negotiations is Concert Technology, right?

A. I'm confused.

Q. Well, it's -- the negotiations that are relevant to the hypothetical negotiation are between Mr. Logan and Concert, right?

A. And just a clarification. If you're talking about for the hypothetical negotiation for the patents-in-suit --

Q. Yes. That's what I'm talking about.

A. Okay. And I'm assuming you want to make a point here, but there's Logan and Apple.

Q. Well, that's what I'm trying to understand. You spent a whole lot of time talking -- I mean, all these emails and this long timeline. And the only negotiations you really talked about were these negotiations between

Logan and Concert. Is that not the right hypothetical negotiation?

A. I think maybe you might have missed the point, that that was one of the inputs into my determination because we talked about a number of other considerations as well.

Q. So, it's not Concert on the other side of the table?

A. The hypothetical negotiation for the patents-in-suit here is not Concert. That's correct.

Q. Okay. So, I should X them out. They're not at the bargaining table with Mr. Logan, are they?

A. That's correct.

Q. Okay. It's really Apple that's at the bargaining table, right?

A. It's Apple at the bargaining table, although we're also trying to see what a prudent licensor and potential licensee would be doing.

Q. Right. But, I mean, as between Concert and Apple, as to who is sitting on the other side of the table in the hypothetical negotiation, it's Apple; it's not Concert?

A. There's a couple of different ways to look at it. There's looking at it as what would the prudent licensor and licensee be negotiating; but in our facts and circumstances, I don't disagree it's Mr. Logan negotiating on behalf of the Logan Family Trust and then a representative of Apple negotiating.

Q. That's what I thought I asked. So, I got that right, didn't I? It's Logan and Apple?

A. Yes. There was a little bit more specifics in there, but I'm not going to disagree with what you said.

Q. And there are some things that you need to take into account here, right? And one of the first things is they're sitting at this table; the patents are infringed, right?

A. That's the assumption of the hypothetical negotiation, yes.

Q. And -- that's Number 1. And Number 2 is they're valid, right?

A. That's correct. Those are the assumptions of a hypothetical negotiation.

Q. Right. You have to assume that.

A. Yes.

Q. I mean, you're sitting there and Mr. Logan is sitting here with a patent that Apple is deemed to have infringed and that is valid, right?

A. Yes.

Q. And now I hate to come back to Concert, but you talked a lot about Concert. None of that stuff --

Concert wasn't using the technology, right?
A. They had a desire to use the technology.
Q. What they had was a desire to take it as a middleman and then try to license somebody else who might actually need the technology because they were infringing, right?
A. I'm having a hard time agreeing with your question. What I can agree with is that Concert wanted to purchase the technology in an attempt to monetize or obtain licensing revenues by licensing it to others.
Q. Right. They wanted to buy cheap and sell high.
A. Frankly, as every buyer does.
Q. Right. But what Mr. Logan is doing here in his hypothetical negotiation, he's going right to the end user and cutting out the middleman.
A. I'm sorry. In the hypothetical negotiation for the patents-in-suit --
Q. Right. He's cutting out the middleman.
A. -- that has to do with a negotiation between Mr. Logan and Apple, yes.
Q. And then you mentioned one other thing that takes place here, and that is they go in smart. Those are your words, right?
A. Yes.
Q. So, the negotiators go in smart. That means,

among other things, that they've done their homework, right?

A. Yes.

Q. And they're going to know certain things.

A. Yes.

Q. We're going to maybe come back to this.

Now, in the hypothetical negotiation the product that would be talked about would not be a playlist, right? The product that would be talked about is what's covered by the '076 and the '178 patents, right?

A. I would agree with that.

Q. And that's not a playlist, right?

A. I agree with that.

Q. It's an audio player with certain capabilities and functionalities as defined by the court, right?

A. My understanding is that there are certain descriptors one has to use to get what -- my understanding of the claimed teachings of the patents. So, I'll agree with you, yes. It's a long sentence.

Q. Right. But it's something you can pick up and touch and hold, and you've got examples up there. It's an audio player. It's a physical device, right?

A. You're going to have to explain to me -- I'm not sure I understand your question.

Q. The patent covers a device, not a method, right?
A. I understand at least halfway of what you're saying. I don't know that I would go so far as to say it's a device. My understanding is that it has to do with downloading playlists and having the ability to navigate in a certain way after those playlists are downloaded. So, it's a --
Q. A device that can do those things, right?
A. A player is involved; but it's very, very -- if you want to call it a device, if we want to go in that direction, it would be a very, very, very small portion of what a device can do.
Q. I'm just talking about -- I'm trying to distinguish here now as to whether we're dealing with a device, player, however we might want to characterize it, versus a method of doing something. Do you understand the difference?
A. Yes, I do but I --
Q. You've testified in a lot of patent cases, haven't you, sir?
A. Yes. I've testified before, yes.
Q. And you've testified in patent cases involving methods, haven't you?
A. Yes.
Q. And you've testified in patent cases involving

products that you can touch and feel, right?
A. Yes.
Q. You know the difference, right?
A. Yes.
Q. This is a case involving products you can touch and feel, not methods, right?
A. It's just that I would not have ever described the contributions of the patents-in-suit using that phraseology. I'm not going to disagree with you; but if you want to go that direction and call it a "device," you've got to recognize the portion of the device -- so, I'm going along with your question here -- the portion of the device that goes along with the patents-in-suit versus everything else we've been talking about.
Q. It's an audio player with functionality and capabilities as defined by the court in its claim construction, right?
A. We're now getting into some technical portions that I'm less comfortable with; but I will give you my understanding, which the patent covers this downloading of playlists to a player and the ability to navigate through that playlist in a certain way that has been downloaded from, say, a server or another computer.
Q. Actually you haven't got that quite right, have you? It's really an audio player with the capability to

do those things, right?
A. Don't disagree with that.
Q. All right. So, that's what we're talking about at hypothetical negotiation, an audio player with certain capabilities and functionalities as defined by the court.
I've been using shorthand for the pages and pages of information that's "an audio player that can receive or download navigable playlists." Do you have any problem with that shorthand?
A. I think as we all -- as long as you've now said that, I think we can move forward with that.
Q. All right. Now, Apple -- when you talk about "go in smart," they would not have assumed that Mr. Logan was stupid, would they?
A. No.
Q. Okay. And in your view of the world -- and you had a demonstrative up there that actually showed a negotiating table with Apple and Mr. Logan at it. Do you remember that in your demonstrative?
A. Yes.
Q. They'd have done their homework on Mr. Logan, right?
A. I'm sorry. Just ask the question again.
Q. They would have done their homework on Mr. Logan, right?

A. Apple?
Q. Apple would.
A. Yes.
Q. Just as Mr. Logan would be deemed to have done his homework on Apple, right?
A. Correct.
Q. So, Apple would have known, among other things, that Mr. Logan had an MBA from one of the top business schools in the country, right?
A. Yes.
Q. Dartmouth --
A. Yes.
Q. -- top school. You've heard of the top school, Dartmouth?
A. Yes.
Q. That he worked for Arthur Andersen, one of the largest accounting firms in the country. They would have known that, right?
A. Yes.
Q. They would have known that he worked for Chemical Bank in New York for a few years. They would have known that, right?
A. Yes.
Q. They would have known that he started a company called "MicroTouch" from scratch and took it from zero

sales to $95 million in sales and zero employees to 600 employees. They would have known that, correct?

A. Yes.

Q. And they would have known that he had a couple failures. They would have known that, too, right?

A. Yes.

Q. You ever heard of *Forbes* magazine?

A. Yes.

Q. Mr. Logan appeared on the cover of *Forbes* magazine?

MS. HUNSAKER: Objection, your Honor. This is beyond the scope of direct. This exhibit is not admitted, and it's hearsay.

THE COURT: Okay. I'm going to overrule beyond the scope. There has been no -- I'll wait until there is an attempt to offer the exhibit before I rule on that one.

And in the context of the hypothetical negotiation, I will overrule the hearsay objection.

BY MR. SCHUTZ:

Q. Dr. Ugone, you're familiar with *Forbes* magazine, correct?

A. Yes.

Q. It's one of the leading business magazines in the country.

MR. CORDELL: Your Honor, may we have a brief sidebar? I apologize. This gets into one of the MIL issues that was squarely addressed at the pretrial conference. During Mr. Logan's testimony, the issue came up. Counsel --

THE COURT: Well, you'll recall that that one is one of the ones that's already coming in with the instruction as to how it can be viewed.

MR. CORDELL: The exhibit that I believe counsel is talking about now, your Honor, has not been offered previously; and the discourse about it had to do with a very serious matter with respect to plaintiff's case and plaintiff's witnesses and they vehemently objected and produced a MIL with respect to our bringing in any of those past acts and I believe that if they pursue this line, we will then be entitled to re-call that witness and go into those.

THE COURT: And that may be true depending on how far he goes. You may be right about that.

MR. CORDELL: Thank you.

BY MR. SCHUTZ:

Q. Dr. Ugone, Apple would have known that on the other side of the table with Mr. Logan was an accomplished, experienced businessman, right?

A. Yes.

Q. Who had been -- who had some notable business successes, right?
A. Yes.
Q. And was highly educated?
A. Yes. The negotiations would be over the patents-in-suit; but they would know his background, yes.
Q. Now, there were -- are really in this case -- and this is a little complicated.
There are two hypothetical negotiation dates because the patents -- there are two patents; and they issued at different times, right?
A. You're just going to have to be a little bit more specific.
Q. Sure. The '076 patent issued in 2001, correct?
A. Yes.
Q. And, so, there is a hypothetical date in 2001.
A. Yes.
Q. And Mr. Nawrocki has assumed that if both the '076 and '178 are found to be valid and infringed, that that's really the only date you need to worry about, right?
A. That's when the hypothetical negotiation would be, yes.
Q. Right. But there is a scenario -- a possible scenario under which the '076 patent is not infringed but the '178 patent is.

A. Yes.
Q. And if that's the scenario, then the hypothetical negotiation date is in 2009, correct?
A. That's correct.
Q. And again -- I'm going to talk about 2009. Apple would again be aware of certain facts in 2009, right?
A. Yes.
Q. And one of the things that Apple would have known is that in another lawsuit they actually had to rely on some of Jim Logan's work to help them out. They would have known that, right?
A. I'm not sure if -- how you want to deal with this, but I'll accept that representation.
MS. HUNSAKER: Objection, your Honor.
THE COURT: What's the objection?
MS. HUNSAKER: This is the subject of a motion *in limine*.
THE COURT: Which one?
MS. HUNSAKER: Regarding other lawsuits, your Honor.
THE COURT: Do you have a number?
MS. HUNSAKER: 15B.
THE COURT: Of yours or theirs?
MS. HUNSAKER: Apple's motion *in limine*, 15B.
THE COURT: Sustained.

MR. SCHUTZ: I'm sorry. Did you say 15A?

MS. HUNSAKER: 15B.

MR. SCHUTZ: B.

THE COURT: If counsel decide they want to argue that particular issue, we can take it up when we get to the break in a few minutes.

MR. SCHUTZ: Sure.

THE COURT: Right now it is sustained.

MR. SCHUTZ: And I will want to argue that at the break, your Honor. Thank you.

BY MR. SCHUTZ:

Q. Let's now talk, Dr. Ugone, about projections. All right? Because projections are one of the things that's relevant during the course of the hypothetical negotiation, correct?

A. Yes.

Q. And the only projections in this case are -- that you've relied on, come from one of the early Dulcimer documents. I believe it's Defendant's Exhibit 42. Right?

A. I'm not sure if it's Defendant's Exhibit 42 but I do have a document in mind and I'm hoping we're thinking of the same one.

Q. This was used during the -- your earlier testimony; so, I think this is the one. I think there are some projections in here. Let me see if I can find them.

This is DX 42 which I believe you testified about on direct. But if you go to page 9 of that document, you will see some projections, right?

A. Yes. These are the ones that I was thinking of when you asked the question.

Q. Right. My recollection is on your direct testimony this is the sole extent of the projections you relied on during your direct testimony, right? Did I miss any other documents?

A. I did not allude to any other documents, if --

Q. Okay.

A. -- that's what you're asking.

Q. So, this is the estimate; and what we've got here is something in a document put together by Apple that talks about the worldwide business opportunity and has a business forecast, right?

A. I'm sorry. That has a business --

Q. I'm sorry. It has a forecast for sales of portable digital audio players.

A. Yes.

Q. And it says, "We expect Apple to capture 5 percent of the market initially and grow very rapidly"; is that right?

A. Yes.
Q. And is that something that Mr. Logan would have been deemed to be aware of when he was sitting at the negotiating table?
A. To the extent that there is expectations as to future performance, yes.
Q. And the future performance we're talking about here is just for digital audio players, right?
A. I'm thinking in terms of the equivalent of the Dulcimer product or the P68. So, I believe that's a "yes" to your question.
Q. And what you are suggesting in this case, though, is that Apple gets what's called a "freedom-to-operate license," correct?
A. Yes.
Q. And a freedom-to-operate license extends beyond merely a digital audio player, right?
A. Well, they were licensing basically the technology, yes.
Q. And, so, it would cover basically everything Apple sold at that point and into the future, correct?
A. It would cover the products if they chose to put the technology in their products, yes.
Q. And, so, what you have at this bargaining table is you've got Mr. Logan saying, "I've got these patents."

And you've got Apple saying, "Great. We'll pay for these patents, but we're not going to limit what they" -- "they go in any product we've got" -- or "can go in any product we've got."

A. That's right. They would negotiate for the option to put it in products that would be developed in the future, yes.

Q. And their entire current fix of products, right?

A. Are you talking about the iPods?

Q. No. I'm talking about the freedom-to-operate license which you think -- as I understand your opinion, is that it would have been a lump sum for a freedom-to-operate license.

A. Yes. I just wanted to make sure we had a clear discussion here. It's a freedom-to-operate license; and if they choose to put the technology in a product, then they would have the freedom to do that under the licensing arrangement, yes.

Q. So, under that licensing arrangement, they could have put it in their Mac computers or anything else they made, right?

A. If it made sense to do so.

Q. And there are no projections on other products that Apple would have the right to incorporate this technology in, right?

A. There's no projections here. That's correct.
Q. So, there are no --
THE COURT: Counsel, we're going to go ahead and take a break.
Ladies and gentlemen, I'll ask you to be back at quarter past.
(The jury exits the courtroom, 2:01 p.m.)
THE COURT: You may step down, sir.
Now, the earlier motion *in limine* was to keep out discussions or references to Apple litigation; and the court had concluded that under 403, that the danger of confusion of the issues and misleading the jury substantially outweighed the limited probative value of that.
You've indicated you have some reason to try to get into or talk to him about the fact that they were involved in other litigation. What is that?
MR. SCHUTZ: Your Honor, what I intended to do was point out that as of the date of the second hypothetical negotiation, Apple had relied on one of the related patents, the '827 patent, as prior art in a case and, so, would have given some credence to his -- it's the same disclosure basically as the patents-in-suit here. And he spent his whole time saying, you know, it's not worth anything and downplaying the value of

Mr. Logan's technology; and here we've got Apple actually citing one of Jim Logan's patents in defense of a case as prior art to a -- it's the *Individual Networks* case.

Was it *Individual Networks*?

THE COURT: Okay. That might be relevant if we did not already have the assumptions of infringement and validity. I know that when they're testifying, experts try to sometimes downplay those; but if they were defending a doctoral thesis, if someone asked him what an assumption was, it's a fact. It doesn't get changed. That's what's there. You don't get to say, "Oh, it's just kind of a guess," like everyone else does in the world. Assumption in this kind of analysis makes a difference.

So, the fact that he's smart or not smart -- he could be dumb as a log. His personality doesn't enter into it when you have an assumption of validity and an assumption of infringement and an assumption of going in smart, as you put it, or total knowledge. So, as I pointed out earlier during one of the breaks, that hypothetical negotiation is the reasonable prudent licensor and the reasonably prudent licensee. And, yes, I will grant you that sometimes there is language in various opinions where they get away from that; but they're not focusing on the damages side of the equation.

So, I will sustain the objection.

MR. SCHUTZ: Thank you, your Honor.

MR. CORDELL: Your Honor, may I raise one more issue?

THE COURT: Yes.

MR. CORDELL: Over the weekend the court may have seen press reports about a deal whereby a consortium of companies took the remaining patent portfolio of the bankrupt Nortel estate. And the numbers reported are --

THE COURT: I've got to tell you this weekend I was not watching news about patent stuff. This was the 4th of July.

MR. CORDELL: Come on, your Honor. Why not? I mean, it just seems --

THE COURT: Like you said, you're both engineer patent attorneys.

MR. CORDELL: Our worry is twofold. Number 1, there is always a risk that a juror saw it and the court gives its admonitions and we hope that the jury will take those to heart.

But I asked Mr. Schutz if he was going to get into that. He assured me that unless we opened the door, he would not. It doesn't sound like we've opened the door to that deal but I just wanted --

THE COURT: No. We're not getting into that deal, nor are we getting into the -- what is it -- Nokia?

MR. SCHUTZ: Nokia.

THE COURT: That's not coming in, either --

MR. CORDELL: Thank you.

THE COURT: -- for the same reasons. Nokia was a settlement of any number of lawsuits and cross-suits worldwide and this other -- to have to now go into was it a distressed sale, was it a nondistressed sale, is it comparable, is it noncomparable, under 403, the extreme danger of confusion of the issues substantially outweighs any limited probative value that might have.

MR. CORDELL: Thank you, your Honor.

THE COURT: Okay. I think that covers all of the objections that were up.

MR. STEPHENS: Your Honor, if I may, there are a few that may come up if Dr. Almeroth testifies between this break and the next one. I don't know if you want to address it now or --

THE COURT: Are you talking about the various exhibits?

MR. STEPHENS: There is an exhibit objection. There is a more general objection about whether or not he can testify again about infringement.

THE COURT: All right. As to both exhibits and as to that, a plaintiff is allowed some rebuttal. I don't generally allow lots and lots, but some limited amount of rebuttal can be added in there. I mean, we could have him re-called after -- well, actually he will be -- no, no, he won't -- yeah, he does actually get re-called after you rest, right?

MR. STEPHENS: Well, this will be his rebuttal testimony, your Honor.

THE COURT: Well, technically you have the burden of proof on validity. You got to go first. It's really --

MR. STEPHENS: We have no objection to him testifying in rebuttal on invalidity. It's simply infringement.

THE COURT: And I would normally allow a plaintiff some limited amount of rebuttal testimony in a case. We're not going to reopen and rehash everything. But, yes, I'll allow some on infringement. It's not going to go on very far, but at this point I'll overrule that. If it starts going on too far, raise the objection again.

MR. STEPHENS: Okay. I'll object to the exhibits that are offered.

There is one other point, your Honor, that I think needs to be raised outside the presence of the jury; and that is again the reexam. I believe Dr. Almeroth is going to express opinions and testimony that he also offered to the Patent Office, and the Patent Office explicitly rejected it.

It seems to me that if he does that, he opens the door to some discussion about the fact that the Patent Office did, in fact, find the other way with respect to those particular opinions --

THE COURT: Well, unless he was to say, "The Patent Office agrees with me" or something like that, the fact that they do or do not agree, that's the whole point of this trial, is that -- as a matter of fact, I think y'all have argued a couple of times "Just because the Patent Office has granted this patent doesn't mean they're worth anything. They're way too busy"; and they're both -- I mean, you haven't used the word "slovenly" yet or "unqualified"; but that's what you've tried to imply, which you should as a good attorney.

MR. CORDELL: In my defense, your Honor, that was the other side that said that, but yes. I was --

THE COURT: Well, no. I think you've gotten into the idea that this patent shouldn't be -- these patents shouldn't be valid because what a crummy job they do and that's why they're here.

So, you all get to argue that; but we're not getting into the reexam, again for the same reason as I've said before under 403, I find that the fact that some administrative body somewhere and even if it's gone up a little higher -- but if it hasn't yet reached the Federal Circuit, their decisions and analysis under the rules they operate under, any limited probative value of that is substantially outweighed by the danger of confusion of the issues and misleading the jury.

The jury has got to make this decision. I'm not going to get into, "Well, someone else has already made it for you. Why don't you take five minutes, flip a coin, and go home." That's not their purpose here. So, I'll overrule that.

MR. STEPHENS: Thank you, your Honor. Do I take it that we need not offer the exhibit to preserve our point?

THE COURT: The exhibits on -- what, the -- the reexam?

MR. STEPHENS: The reexam.

THE COURT: No. You've preserved your point on that. I'm not letting the reexam in before the jury. If you want to make an offer of proof, fine but --

MR. STEPHENS: I understand, your Honor. Thank you.

THE COURT: All right. We're going to take a break.

Would you tell the jury that we'll be coming back at 20 past instead of quarter, so everyone has a little bit of time.

(Recess, 2:10 p.m. to 2:20 p.m.)

(Open court, all parties present, jury present.)

BY MR. SCHUTZ:

Q. Doctor, we're going back to these projections. At the time of the hypothetical negotiation, did you assume that Apple would have thought the product would be successful or not successful?

A. I assumed that -- two-part answer -- that they had confidence in their ability to make a successful product, but there was uncertainty in the marketplace as to whether others would agree with them. Those are the facts.

Q. So, was it going to be successful or not successful?

A. I've given you my answer. Apple believed in their capability to make the product successful, but there was uncertainty in the marketplace from analysts' point of view as to whether the timing and the price of the product was proper given the economic conditions.

Q. Well, let's go through both of them. So, let's take it that it's not going to be successful. If the product was not going to be successful and Apple were to only sell, you know, a few hundred thousand, maybe even a million units, from an economic perspective, they would have been a whole lot better paying 90 cents a unit than $5 million, right?

A. Well, I mean, the dollar amounts would be different; but as I tried to explain before, the nature of the product and the nature of what was going on here takes us towards the lump-sum agreement rather than a running royalty rate.

Q. I know. But that wasn't my question. I'm talking about the Apple -- we assume Apple is a rational economic entity, right?

A. Yes.

Q. They are a publicly-traded large corporation that's supposed to maximize profits for shareholders, right?

A. Yes.

Q. All right. So, if Apple really thought this wasn't going to be successful and they might only sell, you know, a million units or so, if they had paid 90 cents a product, they would only have to pay 900,000 instead of 5 million. So, from an economic standpoint, they would have been a whole lot better off at paying

90 cents a unit as opposed to paying a lump sum, right?
A. Here's where we can agree. 900,000 is less than 5 million. I'm not going to disagree with the math on that. But that's math that doesn't take into account all of the considerations in the hypothetical negotiation. But I'm not going to disagree with your math.
Q. All right. Well, let's go the other way, then, which is it's going to be wildly successful and it's going to sell tens and tens and tens of millions of these. And Mr. Logan would know that, right, if we go with that assumption?
A. If that was his reasonable expectations at the time, yes.
Q. So, we've got Mr. Logan sitting there looking into the crystal ball seeing the same thing that Apple does, that this thing is going to sell a lot; and, in fact, we know that through sometime in 2010, they've sold 93 million units. And Mr. Logan, under that fact, would look into his crystal ball and say, "Oh, I'll just take a little bit of money now; and I'm not going to share the risk and the upside with Apple"? That's your testimony, right?
A. My testimony is that what you're saying does not take into account the considerations at the hypothetical negotiation in terms of what are the drivers of the

sales, in terms of the R&D, the marketing, the pricing strategies, the Apple brand name, everything that would contribute to the future sales.

Q. Well, let's go and look at some of those things. You had a chart you put up there. This was that scroll wheel. You talked about scroll wheel and the fact that Apple has a patent on the scroll wheel, right?

A. Within the context of the easy-to-use interface, yes.

Q. Do you recall whether or not Apple would have had that knowledge when they were sitting at the hypothetical negotiation?

A. I'm not sure if I remember the exact date of the patent, but it was a innovative concept at this point.

Q. Well, I actually -- we can figure out the date of this patent, right? Because it's in the exhibit book you've got up there given to you by your counsel. There it is (indicating), Defendant's Exhibit 199.

And if we enlarge this, we can see that this patent has an effective filing date back in -- filed in October, 2001. But it doesn't issue as a patent. So, Apple is sitting there without a scroll wheel patent because the scroll wheel patent doesn't issue until 2007, right?

A. That's correct.

Q. All right. So, they're sitting there. They're not able to say to Mr. Logan, "Hey, we've got this great patent on a scroll wheel." They can't say that to him, can they?
A. They can't say it's a patent, but it's clearly an innovative design.
Q. But it's not protected. It's not protected until the patent issues, right?
A. I see that, yes.
Q. Now, another thing that you talked about was this fast connectivity FireWire. Do you see that?
A. Yes.
Q. Apple abandoned the use of that a few years later, right?
A. Well, let's be a little careful. They did switch over to the USB approach; but my understanding was at the time the iPod came out, that this was the fastest way to do it. Then there was a change in technology that made the USB approach faster.
Q. And Apple did not invent USB, right?
A. No.
Q. USB 2.0, which is what they went to, is a standard.
A. Yes.
Q. And somebody else contributed to that technology.

Apple just adopted it, right?
A. I don't disagree with what you said.
Q. Now, when we're sitting at the hypothetical negotiation table, Mr. Logan has a patent on an audio player with the capabilities defined by the judge, in the shorthand that we've just talked about, this capability to download and receive navigable playlists, right?
A. I'll accept your representation.
Q. Apple in 2001, sitting at that table, has no patents on an audio player at that scope, right?
A. They had developed a brand-new product; so, yes, I will agree with you, I think.
Q. Developed a brand-new product almost five years after Mr. Logan and his colleagues went to the Patent Office and applied for their patent, right?
A. I'm not sure if I understand your question but in terms of timing, yes, there was the filing of the '076 patent and then later there was the development of the iPod, yes.
Q. I think just one final question on this hypothetical negotiation and we're going to move on to something else.
But as I understand your testimony, the payment of up to $5 million would cover the number of units sold by Apple in the future regardless of the

number of units, right? I mean, it would cover all of the units sold in the future, right?
A. You make a one-time payment that covers, yes, future --
Q. Whether it was a million units, 10 million units, a hundred million units, or a billion units, right?
A. Yes, and that's not an uncommon license.
Q. And you think that Mr. Logan would have bit at that opportunity?
A. Considering the various parties, yes.
Q. But there are some other things you've looked at in coming to your conclusions, right?
A. Yes.
Q. One of the things you looked at were -- and considered were two comparable licenses, right?
A. Yes.
Q. One to E-Data and one to Digeo, correct?
A. Yes.
Q. And those are pretty important to your analysis, aren't they?
A. They're clearly an input, yes, in terms of the license agreements and the quantitative information we were showing. Yes. They were two of the four data points I showed, but there were other considerations as well.

Q. We're going to get to those, too. But your view is that these licenses -- in fact, you have a couple charts on it. Your view is that these are comparable to the license that would have been negotiated in this case, right?
A. I would say that I'm relying on Dr. Wicker that they are technologically comparable and then I take that assumption and work with the economics of it, yes.
Q. So, you look at comparability from two standpoints, right? Technology and kind of the economics or terms and conditions of the license; is that right?
A. Yes.
Q. All right. So, let's start with the E-Data patent. And in the binder, Defendant's Exhibit 282 -- see that? Now, this is actually 282A.
A. I'm sorry. Just bear with me. I have a two-eighty --
Q. Yeah. Let's actually use the one in my book. It's 282. Let me pull that up a second.
282 is slightly different than the 282A. 282 actually has a cover letter from E-Data to Apple. It sends a fully-executed copy. Do you see that?
A. "Enclosed is the executed license agreement," yes.
Q. And you've seen this document before, correct?
A. Yes. Yes.

Q. And it's sent to Mr. Richard Lutton at Apple, right?
A. That's correct.
Q. Otherwise known as "Chip Lutton," right?
A. I can't speak to that.
Q. This is the same Mr. Lutton that Mr. Logan testified about talking with when he was on the stand, right?
A. Yeah.
MS. HUNSAKER: Objection, your Honor. Hearsay. It was excluded.
MR. SCHUTZ: There was no document we introduced, judge, but --
THE COURT: Wait. Wait. Let's pull it down. And your objection --
MS. HUNSAKER: The testimony from Mr. Logan that Mr. Schutz is referring to was excluded by your Honor based on a hearsay objection during Mr. Logan's testimony.
THE COURT: And the letter is coming -- who is the signator of that?
MR. SCHUTZ: E-Data sending the executed license he relied on to Mr. --
THE COURT: Sustained.
*

BY MR. SCHUTZ:

Q. I want to ask you some questions about this license agreement, Dr. Ugone. And let's go to 282A which is in the book that your lawyer gave to you. All right?

A. Just bear with me one second.

Q. Sure.

A. I am there.

Q. And you think this license is a comparable license, right?

A. Well, I've described the technical side, I'm relying on Dr. Wicker; and then I used that input and drew economic inferences from that.

Q. So, let's take a look at Appendix 1. You understand that Appendix 1 is a list of E-Data patents; and it says "partial list," right?

A. Yes.

Q. But these are the only ones identified, correct?

A. That's correct.

Q. And, in fact, you talk in your report at some point about this patent, U.S. patent 4,528,643, correct?

A. Yes.

Q. And in terms of the technological comparison between that patent and the Logan patents, that's the patent that was used for the comparison, right?

A. I'm relying on Dr. Wicker for the comparison.

Q. Right. But you understand the comparison he did was with this U.S. Patent Number 4,528,643, correct?
A. What I'll call the "'643 patent." That's my understanding, yes.
Q. Okay. And let's just take a look at that a second. That's at Defendant's Exhibit 184.
A. In which book?
Q. In the big thick one that I gave you.
Let me know when you're there.
A. Okay. I'm there.
Q. This patent was applied for on January 10th, 1983, correct?
A. Yes.
MR. SCHUTZ: Your Honor, under Federal Rule of Evidence 201, I'd like the court to take judicial notice that this patent was expired at least by January 10th, 2003.
THE COURT: Any objection? It's 20 years later -- or '85 -- or 2005. I'm sorry.
MR. SCHUTZ: Well, the 20 years would be from the filing date or 17 years from the issue date. I'm giving them the benefit of the 20 years, Judge.
MR. CORDELL: Subject to any term extensions, your Honor, which we can't tell from this document.
THE COURT: All right. I will -- at this time

I'll take notice that it would have expired within 20 years of the filing date.

BY MR. SCHUTZ:

Q. So, Dr. Ugone, this patent would have been expired by January 10th, 2003. Do you have that date in your mind?

A. Yes, I do, under your -- under the assumptions we've been talking about, yes.

Q. Well, right now it's a judicial notice fact.

A. Okay.

Q. Okay?

A. I'll accept it.

Q. So, let's go and take a look at the date of the document, which is -- the date of the license agreement is July 23, 2004. Do you see that?

A. I'm sorry. I'm going back to 282A?

Q. 282A.

A. I see that.

Q. So, I'm just trying to understand, you know, what you're testifying here. You're saying that an agreement between Apple and E-Data on a patent that has expired is equivalent to an agreement between Apple and Mr. Logan on a patent that has basically at least 15 years left to run on it?

A. I would say two things. One, this is just one input into my analysis --

THE COURT: Okay. You need to speak up into the microphone.

THE WITNESS: I'm sorry. I'm sorry.

A. I'm sorry. Two things. One, this is one input into my analysis. Obviously the parties made an agreement with respect to a license agreement and mentioned that patent.

The information I don't have, which I'll admit, is the expiration dates on some of the other patents that are also listed in that appendix that you showed to me.

BY MR. SCHUTZ:

Q. You don't have any of that information, right?

A. I don't have that information, but I do know the parties entered into an agreement.

Q. Right. And so --

A. And I'm sorry. I wasn't quite done.

Q. Okay. Go ahead.

A. My reading of the patent is that it would cover sales into some of the territories where those other patents would be relevant.

Q. Foreign sales?

A. Yes.

Q. Well, this case isn't about foreign patents.

A. I know it's not about foreign patents, but it is a license agreement that covers all of Apple's products and has an aggregate cap on it.
Q. But the only patent that was looked at, the only U.S. patent specifically called out here, is one that's expired, right?
A. I don't disagree with that.
Q. Okay. And you never bothered asking or looking into that before you gave your opinion on this license?
A. I did not -- I did not have this information.
Q. Now, this license agreement is really a license relating to *iTunes*, right, not iPods?
A. It does mention sales through *iTunes* in the license agreement.
Q. There's no mention in this license agreement about iPods, right?
A. It doesn't mention iPods. Does mention *iTunes*. But remember what we were saying before -- and this was a discussion we were having -- that this is a freedom-to-operate license that would cover all products. And I'm also relying upon the comparability opinion from Dr. Wicker.
Q. Okay. You've been here, again, for the whole trial, right?
A. Essentially. There was the Thursday-Friday I

wasn't here. Then I was here all last week, and obviously I was here today.

Q. Okay. I lost count of the number of times that Apple's lawyers jumped up and said, "This case is not about *iTunes*." They jumped up repeatedly and said that, right?

A. I heard that, yes.

Q. But this license you think is comparable is an *iTunes* license.

A. Actually I said something different, and I can repeat my --

THE COURT: Okay. You need to speak into the microphone, please.

THE WITNESS: I'm sorry. I apologize.

A. I actually said something different. I was relying on Dr. Wicker for comparability. He explained that during his testimony. They do mention some *iTunes* essentially sales in this license agreement but it's also a freedom-to-operate license that Apple, after signing this license agreement, could do whatever they wanted with the technology and put it into any product they wanted and they would be willing to do that and E-Data would be willing to do that for the $500,000.

BY MR. SCHUTZ:

Q. And --

A. So, those were the probative facts that I was taking from the license agreement.
Q. And the $500,000 comes in two pieces, a 250,000-dollar up-front piece and then $250,000 if certain economic considerations are taken into account?
A. I'll go with your statement. I would describe it differently, but sure.
Q. Or certain sales, based on certain sales of something defined in here we'll get to, then they may have to pay an additional two-fifty, right?
A. Right. And then it's capped, yes.
Q. And all of the sales that are described in here, those are sales in Canada or Europe, right?
A. That's correct, yes.
Q. So, we're not talking about a license that has to do with U.S. sales.
A. No. Doesn't -- well, there's the U.S. component. There's the foreign component. I was giving both to be conservative to include the two fifty -- the second 250,000 to give the 500,000-dollar cap rather than coming in with a lower number at 250,000.
Q. Right.
A. So, that was my thinking.
Q. Right. And that 250,000, that's for that expired patent that Apple doesn't need a license to.

A. Plus, it covers all of the products and the foreign sales as well; so, we're looking at the economic dimensions here.
Q. Right. But in terms of the U.S., which is what we're talking about in this case, Apple did not -- of the only U.S. patent listed in this license, Apple didn't need to pay anything for it; and, yet, they forked out $250,000 for a patent that was expired?
A. I can't speak to what Apple did or did not need to pay for in terms of the U.S. side.
Q. Well, let's move on to the next agreement, which is the Digeo agreement. I believe that that's Defendant's Exhibit 178.
A. I'm sorry. Is that in the black notebook or the white notebook?
Q. Just a second.
That, Dr. Ugone, should be in the small notebook.
Oh, it's 278. I'm sorry. I misspoke. It's 278. So, it's in the big one, the big binder, 278.
Are you there, sir?
A. Yes.
Q. And this agreement talks about certain Digeo patents, right?
A. Yes.

Q. And that's under the "Digeo Patents," Section 1.2, right?
A. Yes.
Q. And it's got three patents listed there, correct?
A. That's correct.
Q. And you relied on Dr. Wicker to say that those were comparable to the patent that Mr. Logan has, right?
A. Yes.
Q. So, why don't we just take a quick look at those. Let's start with Defendant's Exhibit 186. Okay? This is one of the patents -- this is one of the Digeo patents, right? You do a cross-reference.
A. Yes. I'm there.
Q. All right. And this patent has to deal with point-of-sale delivery systems, right?
A. The title is "Systems and Apparatus for Electronic Communication and Storage of Time Encoded Information."
Q. And it specifically talks about these point-of-sale distribution systems in the abstract, right?
A. They do use that term in there, yes.
Q. And then if you go look at the drawings, there's actually a picture of one of the embodiments right here. It's this kind of space-looking thing. I'm not sure exactly what it is. That's what this patent is about,

right?
A. That is one of the embodiments.
Q. Right.
A. That's not to say it might not have other implications.
Q. But anyway, this is the patent that's supposed to be technologically like the Logan patents, right?
A. One of the patents.
Q. Okay. Let's go to the next one, 187. And let's look at the --
THE COURT: Are you talking about Defendant's Exhibit 187?
MR. SCHUTZ: Yes, your Honor. Thank you. Defendant's Exhibit 187.
BY MR. SCHUTZ:
Q. Let's look at the abstract here and see what it says about this. This has got a lot of discussion about book bank facilities and different geographic locations and electronic duplication information and periodicals and books. Do you see all that?
A. I do see that, yes.
Q. And that's another patent that's supposed to be comparable, right?
A. Yes. I believe Dr. Wicker described it as "organizing and downloading information and materials

from a central location."
Q. Were you here during his testimony?
A. Yes.
Q. Did he ever flash these patents up here and walk through them?
A. I don't recall him putting the patents up but --
Q. I don't either.
A. -- I thought someone on cross may have put one of the patents up, but I'm not sure.
Q. Okay. But anyway, he really didn't spend any time kind of walking us through how they're comparable to the patents-in-suit, did he?
A. My recollection is that he had a couple of slides on it and gave his explanation of why he thought they were comparable.
Q. He had some *PowerPoint* slides but didn't really go into the actual documents themselves, right?
A. I don't recall him going into the patent.
Q. Yeah. And that's what we're going to do here and we've done twice and we're just going to go to this one.
Now, this one, in the abstract again, talks about --
THE COURT: Okay. Is this Defendant's Exhibit 188?
MR. SCHUTZ: Yes, it is, your Honor. Thank

you.

BY MR. SCHUTZ:

Q. And, so, this here is, again, talking about point-of-sale delivery systems. It talks about this book bank subsystem and a promotional delivery system. Do you see that?

A. I do, and I do see the point of sale. Again I'll make my comment about relying on Dr. Wicker. And he thought they were technically comparable and also what the license agreement also says as well, that these -- to me, in my reading of the license agreement, that the license agreement goes beyond what you're pointing out in these patents.

Q. Did you actually have a discussion with Dr. Wicker?

A. Yes.

Q. Did you ask him, "Say, Dr. Wicker, is there anywhere in these patents that talk about an audio player that can receive a download playlist that you can navigate through?" Did you ever ask him if that was in there anywhere?

A. You know, I don't know that I can say I've said those exact words but we did have a discussion about what made the patents comparable and that's where he said to me this concept of organizing and downloading information

or materials from a central location, for example.
Q. All right. And you're really not qualified to go in here and find if it says anything about an audio player and playlists, right?
A. I'm not the technical person, and that's why I also have some hesitations when you're pointing out just a portion of this and a point-of-sale machine. When I'm reading the license agreement, there are some aspects of the license agreement that tell me there is something very different in these patents.
Q. So, we'd have had to rely on Dr. Wicker to walk us through these patents so that we'd understand that, right?
A. Subject to what I just said, yes.
Q. All right. Now, you have -- let's just talk about surveys for just a second here. Apple does a lot of surveys, right, sir?
A. Yes.
Q. And they spend a lot of money on surveys, right?
A. I can't speak to how much money they spend on surveys but they do conduct surveys and that was part of the documents that were available in this case.
Q. They spend about $20 million a year on surveys.
A. You know, I think I have heard somebody say that to me before; but I was not able to independently verify

that. So, I don't know.
Q. But you recall acknowledging that in a trial, in previous trial testimony?
A. I remember -- frankly, maybe you have it in front of you and you can talk to me about it. But I remember hearing somebody say that to me, and that's the best I can do.
Q. Let's talk a little bit about some other license agreements. I'd like to talk about Plaintiff's Exhibit 11, Plaintiff's Exhibit 12, and Plaintiff's Exhibit 13. They're in your book.
MS. HUNSAKER: Objection, your Honor.
MR. SCHUTZ: These have been admitted.
MR. CORDELL: Lacks foundation, subject to Motion *in Limine* 21. These are unexecuted agreements. There has been no testimony other than referring to half of a signature page, the remainder of which is unexecuted. It's also subject to the Motion *in Limine* 21 regarding noncomparable licenses. This is not a patent license; it's a technology license.
THE COURT: Okay. And your objection is to the admission of these?
MR. SCHUTZ: I believe they're already --
THE COURT: Wait. Wait. I'm talking to her.
MR. SCHUTZ: I'm sorry, your Honor.

MS. HUNSAKER: I do object to the admission of any pages that there was no testimony about. There was no testimony about the substance of these documents because they are unexecuted. They were produced late, and they were the subject of motions *in limine* and objections relating to noncomparable licenses.

THE COURT: Okay. They've already been admitted. They were admitted previously. Are you just stating the objection to preserve any point, or is there some new objection? Because normally once it's been admitted, you don't bring up a new objection. I just want to be sure I'm understanding.

MR. CORDELL: I'm objecting that the exhibits lack foundation. They are not executed by the parties.

THE COURT: Okay. They're already admitted. I'm not going to entertain new objections that could have been made earlier. Any previous objections you made as to these exhibits or one of your co-counsel made as to these exhibits are in the record and my rulings on them are on the record and to bring up a new set of objections on things that have already been admitted is not appropriate. Those kind of objections have been waived.

Now, if there is some other objection not as to their admissibility, I'll be glad to listen to it if that's what you're trying to say.

MS. HUNSAKER: So, your Honor, they're going to elicit new information that has not come into testimony before. Your Honor reserved ruling on whether or not they would or could be used with the expert witnesses in this case based on their lack of comparability and the substance of Motion *in Limine* 21.

THE COURT: All right. The objection is overruled. I'm not going to accept new objections that could have been made when exhibits were previously offered.

And, ladies and gentlemen, as you'll see in your instructions, when you're comparing various kinds of licenses, one of the issues you'll look at is are they comparable. So, if there is an issue there, that's something that you'll need to consider.

But I'm going to overrule the objection because these have already been admitted, and I'm not hearing another -- ma'am, I'm just not hearing another objection. That issue has already been dealt with. And as I say, I don't find it appropriate to bring in objections that could have or should have been raised before. If the whole purpose is just simply to renew them to be sure there is no waiver, that's fine. But my rulings stay as they were.

Okay. Go ahead, counsel.

MR. SCHUTZ: Thank you, your Honor.

BY MR. SCHUTZ:

Q. Dr. Ugone, Plaintiff's Exhibit 11 is something called -- titled "Made for iPod License," right?

A. Yes.

Q. When you were doing your analysis in this case, did you ask for any documents that might have the word "iPod" and "license" in it from the Apple lawyers?

A. I did not say those words. I did ask for all the licenses that -- or agreements that had been produced in the course of this litigation that were made available to the parties.

Q. Right. But in terms of trying to, you know, make sure -- you wanted to do an accurate job, right?

A. Yes.

Q. And you wanted to be thorough, correct?

A. Yes.

Q. And this is a case about iPods, correct?

A. Yes.

Q. And one of the issues is whether there should be a license for the iPod, right?

A. Let's be a little bit careful. When you say "this is a case about iPods," this is a case about a license to the patents-in-suit which is one feature within a multifeature device called an "iPod." I will agree with

that.
Q. Do you disagree, sir, that this is a case about whether the Apple iPod infringes the two patents in this case?
A. I think I was clear in what I said. I understand that the iPods are accused. All I'm trying to make sure everybody understands is we're talking about one small feature out of a multifeature product.
Q. You know, I understand. Like I say, I'm just a country boy. Okay? I grew up on a farm. You know? It's simple. Is this a case about iPods?
A. I'll say it again, that the accused products are iPods and we're talking about one small feature within a product that has many, many features. I feel that's the best way to describe it. But the iPods are an accused product. I don't disagree with you on that.
Q. Well, let's work with that. At least we know that the iPod is accused of infringing a couple of patents, right?
A. Yes.
Q. And one of the things about your job is to assume it's infringed; assume the patents are valid; and decide, Number 1, what kind of license and, Number 2, how much money, right?
A. In terms of the royalty payment in the absence

of -- if an agreement had been reached, yes.
Q. Right, for the iPod and what kind of license, right?
A. For the license to the patents-in-suit.
Q. Right.
A. The license to the patents we've been talking about.
Q. Okay. So, would you have wanted to get from Apple any documents they had in their position that had the word "iPod" and "license" right next to each other in the title of the document? Would that have been something you would have wanted to know about?
A. If they were relevant to the analysis, I wouldn't disagree with you. If they are not relevant to the analysis, then I would not want those or would I ask for those.
So, you asked me previously is more data better than less data; and the answer I gave you was if it's relevant, then more data is better. If it's not relevant, then it's not helpful.
Q. Dr. Ugone, you wrote a report --
MS. HUNSAKER: Your Honor, these exhibits were not admitted for all purposes. At the court's trial transcript at pages 202, line 18, through page 203, line 3, your Honor discussed a limited purpose

admissibility for these exhibits. So, if I could state that objection for your Honor's consideration.

THE COURT: Okay. And I -- all right. You're right. They were admitted for a limited purpose. I stated that. I think the jury will follow that instruction. The same purpose is there.

If your objection is that they have been used or are being used for something outside of that, then go ahead and state that.

MS. HUNSAKER: Yes, your Honor. I object that they are being used for outside the purpose that they were admitted for.

THE COURT: All right. And I think I just instructed the jury that, ladies and gentlemen, you're going to have to assess whether or not the licenses are comparable, i.e., do they have something to do with the damage in this case or are they relevant to other issues.

I allowed them in earlier for background. I'm going to allow the cross-examination here, but they have not been admitted -- and I'll say it again. They're not admitted as comparable licenses because that hasn't been shown.

Now, counsel can try to show that they are comparable; but they have not been admitted as that. So, they are still admitted for just the limited purpose which I told you before. You'll receive an instruction that those are the limitations that you have to follow.

All right. Go ahead, counsel.

MR. SCHUTZ: Thank you, your Honor.

MS. HUNSAKER: Thank you, your Honor.

BY MR. SCHUTZ:

Q. Dr. Ugone, you submitted an expert report in this case on November 19th, 2010, correct?

A. Yes.

Q. At the time you submitted that expert report in this case, you knew full well about these Made for iPod licenses, correct?

A. I will answer the best I can, that I have knowledge that there's Made for iPod license agreements that are technology agreements that are not patent license agreements; but I don't have knowledge of them, frankly, because of what's been produced in this case.

Q. Dr. Ugone, three weeks -- three weeks -- before you issued your expert report in this case, you testified in a patent case before Judge Clark in the Eastern District of Texas and talked about these Made for iPod --

MS. HUNSAKER: Objection, your Honor. He's talking about other litigation that's subject to Motion *in Limine* 15B.

THE COURT: All right. Let's -- I'd like to see counsel up sidebar.

(The following proceedings were conducted at sidebar with all parties represented.)

THE COURT: All right. Which case is it you're saying --

MS. HUNSAKER: So, this is your Honor's case --

MR. HEARTFIELD: Your Honor, this is the *Affinity-Hyundai* case in Lufkin; and I think representatives of Personal Audio were at that trial.

THE COURT: All right. They may have been at the trial; but I don't see how that relates to 15, which was to keep out litigation Apple was a party to. I think Apple had a representative there because they were worried about it; but that's different than Apple's litigation, which was your motion *in limine*.

MS. HUNSAKER: So --

MR. HEARTFIELD: He's bringing it up in the context of other litigation.

THE COURT: Well, you can cross-examine an expert about other litigation he's testified at; but it's not Apple's litigation in an effort to make Apple look like they're involved. That was your motion *in limine*, "Don't talk about Apple because it makes us look litigious," right, in summary?

MS. HUNSAKER: That was the other indication, yes, sir. There was a previous *Affinity* case --

THE COURT: But the things that you're asking Ugone about is his testimony in another trial which did not involve Apple, right?

MR. SCHUTZ: That's correct, your Honor.

THE COURT: Okay. I'd prefer you not mention it being in my court --

MR. SCHUTZ: Oh, I'm sorry.

THE COURT: -- because that raises a whole other host of issues.

MR. SCHUTZ: I won't bring that up anymore.

THE COURT: But why -- tell me why you can object or why -- what's the basis for objecting to him testifying about patents or licenses in another case when it's not litigation that Apple was a party to?

MS. HUNSAKER: Because there were other reasons in that case that Made for iPod was relevant. They were not relevant to the reasonable royalty of the patent license. Mr. Logan signed up for the Made for iPod license at the same time the *Affinity* trial was going on; and that's why these licenses are unsigned, because we believe Mr. Logan learned about the program through that trial. So, we think this evidence was created for this litigation to the extent he learned about it during your Honor's previous trial and then went and signed up for it.

So, we don't think the testimony in *Affinity* is in any way relevant to the reasonable royalty for a patent license which is the purpose for which Mr. Schutz is trying to cross-examine Dr. Ugone. *Affinity* involved car chargers used by Volkswagen, and that is a legitimate use of the Made for iPod program.

THE COURT: Okay. As I understand your cross, you're trying to show that he did not consider all possible information and clearly he was aware of it because he had testified in another trial, correct?

MR. SCHUTZ: And there's more.

THE COURT: All right. Because we're not going to get into comparability.

MR. SCHUTZ: There is another -- I'm in the process of linking up -- and I'll just highlight it right now. The *Affinity* patents in that case are actually much closer than the technology he claims he relied on. They cite the Logan patents. So, at least they're in the same -- and so --

THE COURT: What does that have to do with the iPod user license agreements?

MR. SCHUTZ: He said it's an indicator of value and it's a per-unit royalty and he is sitting there saying they never would have -- he testified in a previous case that these iPod licenses are an indication of value in that case for patents that are much closer to the Logan patents than the Digeo or E-Data patents. They actually cite the Logan patents. And, so, I --

THE COURT: Okay. And your objection, why shouldn't he be -- yes. It's harsh taking on an expert and surprising him, but that's kind of what people try to do on cross-examination.

MS. HUNSAKER: So, I mean --

THE COURT: So, tell me what the objection is. Give me your objection.

MS. HUNSAKER: The objection is it's irrelevant. It is misleading. It is being offered for an improper purpose. It's going to waste time because I'm going to have a whole lot of redirect to go on this, and I believe it is precisely what 402 and 403 and the Federal Circuit's recent case law on noncomparability admonishes the court to keep away from the jury rather than having them sort through the comparability on something that's not even a patent license.

THE COURT: Okay. Overruled.

Now, you'll want to keep track because if he starts straying further, you may want to preserve your record.

MS. HUNSAKER: Okay.
MR. HEARTFIELD: Thank you, your Honor.
MS. HUNSAKER: Thank you, your Honor.
(Sidebar conference concluded.)
THE COURT: Go ahead, counsel.
MR. SCHUTZ: Thank you, your Honor.
BY MR. SCHUTZ:
Q. I'm going to pick up where we left off, Dr. Ugone. And I think we left off with you having -- actually three weeks prior to doing your expert report in this case having testified in a trial not involving Apple -- I'll make that clear -- testified in a trial about these Made for iPod licenses, correct?
A. I will agree with you that I was involved as an expert witness in a trial where parties had available these Made for iPod licenses. The trial did not involve Apple. I just don't remember the timing, whether it was three weeks or not; but I'll accept your representation.
Q. All right. Well, let me -- so, are you saying you're not -- I will represent to you that your testimony was on October 26th, 2010.
A. I'm willing to accept that. That's what I'm saying.
Q. All right. And the case was *Affinity Labs versus BMW of North America* and some other parties. Do you

remember that?
A. Yes.
Q. And in that case -- if you want to look, your transcript is at Plaintiff's Exhibit 793. Right? Let me know when you're there.
A. I am there.
Q. And in that case you were testifying on behalf of the defendant, right?
A. If I'm allowed to say the name, yes.
Q. You were testifying on behalf of the accused infringer?
A. Volkswagen, yes.
Q. Right. And, so, in that case --
A. I'm sorry. Volkswagen/Audi, yes.
Q. And, so, you were testifying opposite the patent holder and for the company that had been charged with infringement, right, so we can get the context?
A. Yes.
Q. And in the course of your career, when you have testified for -- because at times you testified for the defendants, the accused infringer; sometimes you testified for the patent owner, right?
A. That's correct.
Q. And when you've testified for the patent owner, you have always included in your analysis at least the

option of a running royalty, correct?
A. Yes. I know what you're referring to and I think it might have been in my deposition where I said I've done a lump sum but in combination with a running royalty option as well because that was what the evidence dictated.
THE COURT: Could you pull that microphone in front of you?
THE WITNESS: I'm sorry. I'm sorry.
BY MR. SCHUTZ:
Q. But you've only done that once, right?
A. That's the one I recall, yes.
Q. Right. Then other times that you've testified for the plaintiff, it's always been for a running royalty, correct?
A. There's different products involved and different facts and circumstances; but that's to the best of my recollection, yes.
Q. So, every time -- other than that one instance where you've testified to both a lump sum and a running royalty, every time you've testified for the patent holder it's been for a running royalty, correct?
A. I believe the nature of the product was different, but yes.
Q. Now, in the *Affinity Labs* case, you are testifying

for the accused infringer; and in the course of that case, you said lump sum would be appropriate, right?
A. Yes.
Q. But you also had testimony saying that if the jury were to consider a running royalty, there are some things that they should look at, right?
A. You're going to have to show me; but if that's what I said, I said that, yes.
Q. Well, let's go to the transcript, page 62 -- this is the transcript from the *Affinity Labs* case which is at Plaintiff's Exhibit 793.
A. I'm on page 62.
Q. All right. And in that case, at line 7 on page 62, the question is: "Are there other licenses that you looked at that you believe are relevant that should have been reviewed if the jury, in fact, believes a running royalty is appropriate?"
I read that correct, didn't I?
A. Yes.
Q. And you answered, "Yes"?
A. Yes.
Q. And then the question is: "What are those?"
And you answered, "Those are some -- what we've been calling 'Apple Made for iPod' licenses," right?

A. Yes.
Q. Then you go on to describe a little bit that these are licensing the ability to connect an iPod into a sound system, right?
A. Yes.
Q. And those licenses were per-unit basis, right?
A. Yes.
Q. So, anytime somebody manufactured a product that would allow an iPod to connect into a sound system -- which was an issue in that case, right?
A. It was connecting -- actually it had to do with iPods connecting into the entertainment system of an automobile. So, that's what made these directly relevant. These were Made for iPod licenses for connectivity purposes. That case had to do with taking your iPod and you plug it into your glove compartment so it goes through your sound system. So, that's exactly what this case was about; and that's why these were relevant.
Q. Right. But it was relevant for two reasons --
THE COURT: Okay. Wait a minute, Counsel.
Dr. Ugone, I'm going to tell you one more time. Pull the microphone over to the left so that we can all hear. The acoustics in this room are a little odd up here on the bench.

THE WITNESS: I'm sorry.

THE COURT: And it's not yet that I'm so old that I'm deaf. I'm just -- I need to hear this.

THE WITNESS: All right.

BY MR. SCHUTZ:

Q. So, in that case, Dr. Ugone, the licenses were relevant -- the Made for iPod licenses were relevant for two reasons. One is the form, which was a running royalty; and second was the amount, correct?

A. Just ask the question again. I'm sorry, sir. I didn't get your question.

Q. I'll break it up -- well, same question.

In the *Affinity Labs* case where you testified for the accused infringer, you said and testified that the Apple Made for iPod licenses were relevant for two reasons: One, if the jury was to consider a running royalty, they could look at that for some guidance, right?

A. Yes. So, I had testified to a lump-sum; and we can get into those reasons. But if the jury decided to go with a running royalty rate, I was giving some guidance on that as well.

Q. Right.

Now, the patents in that case -- let's look at a couple of the patents in this case. One of them is

Plaintiff's Exhibit 795. Are you with me there?
A. I see it up on the screen. Is it in the book as well?
Q. Yes. Plaintiff's Exhibit 795, It's in the book.
A. Okay. I have it.
Q. And this is one of the *Affinity Labs* patents that was at issue in that case, correct?
A. Yes. I remember the inventors, yes.
Q. And in this patent there is a reference to Mr. Logan's patent in the list of prior art, right?
A. If you could point me to that so I could see that.
Q. I'm going to do that. And it's right here (indicating). That's the '076 patent, right?
A. That's correct.
Q. And, so, what we have is a patent in the *Affinity Labs* case on which you're testifying about; and that patent makes reference to the Logan patent, right?
A. If maybe I can use my words. This is one of the patents that was in dispute in that case.
Q. Yes.
A. And it was the owner of the patent that was bringing suit against BMW, Volkswagen/Audi, and some others.
Q. Right.
A. And, so, this was the patent in dispute; and in

his patent -- what you're pointing out as one of the pieces of prior art includes the Logan patent. So, yes to that, if that was the question.

Q. Here's what I'm getting at. I'm questioning -- this is all about questioning your argument that the E-Data and the Digeo licenses are comparable both on their terms and on technology. Okay? That's what this is all about. I'm not trying to hide anything. Okay?

A. Okay.

Q. And you testified in another case on a patent -- involving a patent that actually makes reference to the Logan '076 patent and, yet, in the Digeo agreement and patent and in the E-Data patents, there's no link that that's that direct, correct?

A. You may have to break down the question, but I -- if I may answer.

Q. Sure.

A. Okay. That case had to do with the claimed use of this patent, which had to do -- my recollection --

THE COURT: Be careful. Claimed use of which patent?

THE WITNESS: Oh, I'm sorry. What I'll call the "White patent" -- the -- can we call it the "'228 patent"?

*

BY MR. SCHUTZ:

Q. Sure.

A. Okay. That case had to do with the claimed use of the '228 patent which had to do with the connectivity of an iPod to an entertainment system.

The point I was making at trial was here's an iPod -- Made for iPod license agreement where you can actually use Apple's technology of how to connect -- there's connectivity issues. There's technology. There's using the logo. And the point I was making is that the plaintiff expert and the plaintiff was asking for an amount far in excess for what's called a "bare license," just getting the right to use the teachings of the patent when, in fact, you can get the actual technology from Apple to do those connections and in that case for 50 cents a connection and they were asking in excess of that.

My point was if all somebody is getting is a piece of paper that says you can use what's in the patent but you've got to come up with all the technology, when you compare that to the Made for iPod licenses where Apple was licensing the technology to you, Apple was licensing it in that case for 50 cents a connection. The plaintiff in that case was asking for much more, and I was saying that wasn't making economic sense.

Now, what I will admit is I was giving guidance to the jury in terms of if they were going in that direction for a running royalty rate, this is an economic consideration. But I will admit in this case I gave a lump-sum opinion to the jury in that case --
Q. Dr. Ugone --
A. -- based on some factors that have not come out yet in our discussion. Maybe they will, but there are other factors that led to my opinion that I'll hold off on until I get the question.
Q. Sure.
Dr. Ugone, do you think that the rules as between Apple and Mr. Logan should apply equally?
A. If you're asking about the hypothetical negotiation, there's parties there. No one side can dictate the outcome. You look at the economic considerations and come to a decision.
Q. Okay. You only looked at licenses where -- and two comparable ones, and we've talked about those. The only comparable licenses you've testified about are where Apple has been the party that's the licensee, right?
A. Yes. That's also what would have been happening in this situation here, but I don't disagree with you.
Q. And you have not looked at any situations where Apple would be the licensor, correct? Because when Apple

is the licensor, as they are with regard to the Made for iPod licenses, they demand a running royalty?

MS. HUNSAKER: Objection, your Honor.

THE COURT: What's your objection?

MS. HUNSAKER: My objection is 403.

THE COURT: Overruled.

BY MR. SCHUTZ:

Q. So, when Apple is on the other side of the bargaining table, they want different rules to apply, right?

A. I -- I'm not sure if I understand your question, but I don't -- I'm not sure if I agree with you. You're going to have to help me out. I'm not sure what your question is.

Q. Well, in that case we've got this bargaining table. We've got Mr. Logan on one side and Apple on the other, right?

A. Yes.

Q. And Mr. Logan has the patents and the technology; and Apple needs it, right?

A. Yes.

Q. And in that situation you say Apple will only pay a lump sum, right?

MS. HUNSAKER: Objection, your Honor. This is beyond the scope of direct, and it's misstating the witness' prior testimony.

THE COURT: Overruled.

A. Actually what I said was that all of the economic evidence that I've looked at indicated that Apple has a preference for a number of reasons for a lump-sum payment. Mr. Logan has exhibited a willingness to accept a lump-sum payment; and, so, when I look at those two, I don't suddenly get a running royalty rate as the outcome of the hypothetical negotiation.

BY MR. SCHUTZ:

Q. So, then I want to come back to my question as to whether the rules apply to Apple equally as they apply to Mr. Logan. So, when they changed spots at the bargaining table and it's Apple with the technology and somebody else wants to license it, Apple says, "Oh, no. We want to be paid on a per-unit basis. We're not going to give you this license to make products that connect for a lump sum," right?

A. Okay. Actually you said something that was actually insightful when you said "the technology." If we're talking about the Made for iPod licenses, those are technology licenses as opposed to just a bare patent license where you get a right to use the claimed teachings of the patent but you don't get any guidance, you don't get any technology. So, if you're talking about the Made for iPod licenses, there is actually a technology transfer that's going on, in addition to the use of the logo, in addition to a number of other considerations.

Q. My real questions go to the form of the license, which is per-unit versus running royalty. And in the case of Made for iPod license, you agree with me that those are per-unit licenses, correct?

A. I will agree with that, but it's a technology transfer. Technology transfer.

Q. And, in fact -- let's take a look at another document that I want to ask you about. That's Plaintiff's Exhibit 745.

A. Just bear with me one second.

Okay. I've found it.

Q. This is the Dulcimer -- one of the Dulcimer documents from Apple's files. Do you see that?

A. It was one of the early Dulcimer documents, yes.

Q. Right. And you were here when Mr. Fadell and Mr. Ng testified, correct?

A. Yes.

Q. Is this a document that you had seen prior to this trial at some point?

A. Yes.

Q. And do you remember when you saw this? Was it when you were getting information from Apple about what to look at?

A. Loosely speaking, I would agree with that, yes. In some portion of what's called "discovery," when documents are available to the parties, I think, is when I probably received it, either this document or documents similar to this.

Q. Okay. Well, do you think you got this one?

A. I can't say for sure. I would have to look at the Bates numbers versus what's in my report, but I know I have similarly-situated documents.

Q. Well, we only got a copy of this document three weeks before trial. Does that surprise you?

A. I can't speak to that.

Q. Okay. I want to take a look at this document. Let's go to this page, "Device Cost Analysis."

THE COURT: All right. You said "this page." What's the number?

MR. SCHUTZ: Your Honor, it's page 15. Thank you. It's page 15 to Plaintiff's Exhibit 745.

BY MR. SCHUTZ:

Q. Let me know when you're there.

A. Not to be confusing, but is it the one that has the other Bates number of 2779? Is that also on it?

Q. Yes.

A. Okay. I'm there.

Q. And in this Device Cost Analysis, there is a line item for licenses, right?

A. Yes, there is.

Q. Now, I'm not going to get into what may be covered or not covered by those licenses. But the fact from this document is that this is Apple paying out, correct?

A. Yes.

Q. Which is the same situation as we're dealing with here, Apple having to pay out to somebody else, right, out licensing, correct?

A. Yes.

Q. And for the Dulcimer product, which became the iPod, they have listed a per-unit rate for licenses, correct?

A. We both know that's a mischaracterization of what that number is.

Q. Well, it's by the -- per unit.

A. It's not uncommon for companies, when they're looking at the cost of production, to say how much is it on a per-unit basis to just understand that if I sell a product for a hundred dollars, if I take my labor and allocate it across units, if I take my marketing and allocate it across units, you can come up with a per-unit amount.

So, I'm quite confident whether it's on this or other documents you'd see -- you could probably see a labor category that said 15 cents per device; but that doesn't mean they paid their labor 15 cents per device.
Q. And, so, you think that you got this document earlier than three weeks before trial?
A. I can't speak to when I received this document. What I'm saying is I've seen other documents that have line items like this, and I've seen other documents like this. And I'm not disputing with you that there is a license line item. I'm not disputing that at all. What I'm disputing is just the one inference that the only interpretation of this line item is that it's on a per-unit basis; and the inference I thought you were going with is that, ergo, every license agreement they have must be per unit.
If I misinterpreted, you can tell me; but I'm just saying it's not uncommon for companies to look at products they produce and say, "Let's just break it down so it's easy to understand on a per-unit basis."
Q. Setting aside any dollar amounts, Apple has entered into per-unit licenses related to the iPod for technology of some sort, right?
A. I will not disagree with that.
Q. Does that mean --

A. I would agree -- yes. I will agree with you. That's economist-speak. I will agree with you.
Q. Economist-speak. Have you heard the one about three economists stuck in a hole --
THE COURT: All right, counsel.
MR. SCHUTZ: Okay.
BY MR. SCHUTZ:
Q. Okay. Now, let's now go to -- I had a couple questions about some of the slides you had here. Let's talk about this one, "Methods of Accessing Music." This was from your direct testimony. Do you remember that?
A. Yes.
THE COURT: And for record purposes, could you mention the defendant's slide number?
MR. SCHUTZ: Yes, your Honor. It's getting late. It's DDX 817, Defendant's Demonstrative Exhibit 817.
BY MR. SCHUTZ:
Q. And these are all the different ways you could access music other than the downloadable navigable playlist, right?
A. Using your shorthand, yes.
Q. And, so, did you ever think about saying to anybody at Apple, "Hey, look, there are all these ways you can access music. Just get rid of the downloadable

navigable playlists, and you don't have any issues here"? Did you ever suggest that to anybody at Apple?
A. Two-part answer: A, I didn't suggest that; but, B, given the nature of work that I do, frankly there's a lot of companies that at various points in time get accused of using a certain technology and -- I don't want to get into too many details, but companies can't just start taking technology out every time there is an accusation because it may end up being an incorrect accusation. So, companies cannot just run around changing their products every time somebody says, "You're using my technology."
Q. I'll grant you that. That's fair. But if it's worthless technology and nobody uses it and nobody cares, why not take it off?
A. There could be a variety of reasons.
Q. Well, you were in the courtroom -- well, before I ask that, I need to go to -- and I don't have the -- you changed the slide.
MR. SCHUTZ: Can you guys bring up DDX 804?
BY MR. SCHUTZ:
Q. So, on Apple information here -- you talked about this earlier. You had an interview with Mr. Lancaster, right?
A. Yes.

Q. Prior to the start of this trial, you did not interview Mr. Dave Heller, correct?
A. That's correct.
Q. And prior to the start of this trial, you did not interview Mr. Tony *[sic]* Ng, correct?
A. That's correct.
Q. And prior to this trial, you did not -- it's Stan Ng. I'm sorry. You did not interview Stan Ng?
A. Correct, yes.
Q. And prior to this trial, you did not interview Tony Fadell, right?
A. That's correct.

THE COURT: All right. Counsel, we're going to take a break.

Ladies and gentlemen, I'll ask you to be back at quarter of.

(The jury exits the courtroom, 3:29 p.m.)

THE COURT: We'll be in recess until quarter of.

(Recess, 3:30 p.m. to 3:46 p.m.)

(Open court, all parties present, jury present.)

THE COURT: Go ahead, counsel.

MR. SCHUTZ: Thank you, your Honor.

*

BY MR. SCHUTZ:
Q. Dr. Ugone, is it fair to say that the fundamental disagreement you have with Mr. Nawrocki is that he gives too much credit for the contributions of the invention in this case to the iPod?
A. I think that's an end result of his analysis, yes.
Q. I mean, if I were to sum up your real beef with him, that's really it, right?
A. Well, as I said at the very beginning of my testimony, I have two opinions in this case, the form of the license agreement and the payment structure which would be a not-to-exceed or a lump-sum amount, and also what the aggregate amount would be. And those are -- actually when you cut away from everything, if you just put our opinions side-by-side, that would be a difference.
I say an amount not to exceed. He says a running royalty rate. I say not to exceed 5 million; he says $84 million. That's the difference.
Q. You think he values the technology covered by the patents too much, right?
A. I think he values the technology too much, and he creates a licensing situation where there is a running royalty rate that compensates the patent holder for contributions made by Apple to the success of the

product.
Q. You don't think that the contributions of the patented technology to the iPod are important, right?
A. I'm sorry. Ask that again.
Q. You do not believe that the contributions of the patented technology to the iPod are important, right?
A. As important as Mr. Nawrocki says.
Q. Oh, you believe they're sort of important?
A. Well, there's playlists that -- there's the allegation -- I have to assume infringement. I have to assume that that technology is being used that is in the product; so, that's the basis for why I said that. That's an assumption I have to make.
Q. Let's review a little of the testimony of some actual Apple witnesses, and this is at -- it's a demonstrative exhibit, PX 1076. Let me know when you -- I have it on the screen. You can either follow along this or look in your book.
A. I'll read on the screen.
Q. Sure. And you were here when Mr. Fadell testified, right?
A. Yes.
Q. And I asked him, "And, so, having an audio player that could receive and download playlists, that particular feature being able to receive or download

those playlists, was a competitive necessity, right?"

And he answered, "If you mean by competitive necessity would it be a successful product and people would review it and look kindly on it, yes, I would say that."

You were here for that testimony, right?

A. I was here for that testimony, yes.

Q. But prior to arriving at your opinions, you never interviewed Mr. Fadell, did you?

A. I believe I had his deposition transcript. I think there might be some confusion over the question and answer that's being given here, but you can read it for the jury. But I did not interview him. That's correct.

Q. So, you think Mr. Fadell was confused?

A. No. I think the question is talking about playlists. I don't read that question to be my understanding of what the claimed teachings of the patents are. This is just asking playlists.

Q. It says "audio player." Am I missing something here?

A. It says "playlists." It doesn't talk about all of the other aspects that I understand are the claimed teachings of the patents-in-suit.

Q. Well, there's even more --

A. I'm sorry. I wasn't --

Q. Okay.
A. But my understanding is he was asked, you know, about playlists; and that's the answer he gave.
Q. Well, he was asked about an audio player that could receive and download playlists, right?
A. Yes.
Q. And we didn't even get to the other parts of the invention, which is the ability to navigate through it. So, if at least this was a competitive necessity, the ability to navigate through them would certainly be a competitive necessity, right?
A. I would not necessarily agree with what you're saying.
Q. Now, the other thing I put up there was an excerpt from my questioning when I asked him, "How much did it cost to develop the original iPad *[sic]*" and he said --
THE COURT: Is that iPad or iPod?
MR. SCHUTZ: I'm sorry, your Honor. iPod.
BY MR. SCHUTZ:
Q. And he said, you know, "probably around between 5 to 7, maybe 8 million, somewhere in that range." Do you see that?
A. Yes. And I remember that testimony.
Q. And coupled with what you're saying in here today, Apple, having paid 5 to 7 million, instead of taking a

running royalty and seeing how it worked out, would have forked over another $5 million up-front?

A. Yes, because if they put themselves in a running royalty rate position and if they knew what they had to do in order to make the product commercially successful and if the product was commercially successful with a running royalty rate, you could end up with the overvaluing of $84 million like we see here.

Q. Well, what you end up with is if it turns out to be a great product, you're going to have to pay for it; and if you don't want to use the technology, you can always stop using it, right?

I mean, nobody's forcing Apple to use the technology, are they?

A. I don't disagree with that.

Q. Pardon me?

A. I do not disagree with that.

Q. Okay. That "do not disagree" means you agree with me, right?

A. I do not believe anybody is saying to Apple, "You have to use this technology."

Q. I mean, they could take the technology off, right?

A. The product could change, yes.

Q. Right. Now let's go to the next slide.

And I asked Mr. Heller, who is sitting right here (indicating) --

THE COURT: Can you identify the slide, please?

MR. SCHUTZ: Yes, your Honor. It is Plaintiff's Exhibit 1076. I'm still at 1076. This is page 2.

BY MR. SCHUTZ:

Q. And I asked Mr. Heller:

"Question: Mr. Heller, have you ever suggested to anyone at Apple that any of the features or capabilities of the iPods be removed?

"Answer: Not to my recollection, no."

Then I asked him: "If Mr. Jobs were to come to you and say, 'Mr. Heller' -- he might call you 'Dave,' but I'll call you 'Mr. Heller' -- 'we've got to take some features or capabilities off the iPod, and I need some help. What should we take off,' where would you start? What's the first thing you'd remove in terms of a feature or a capability of the iPod?"

See that?

A. Yes.

Q. And then he answered: "I have a personal list of what I would remove."

"Question: And what would you remove?"

And he said, "I would remove games."

Right?

A. Yes.

Q. And then I asked him: "Okay. And what's the second thing you'd remove?"

"Probably contacts and calendars."

Now flipping to the next page in the same exhibit, PX 1076, page 3.

"Question: Would you ever suggest removing the capability to receive or download navigable playlists?"

And he answers, "No."

And I said, "Would you ever -- why not?"

He said, "Removing a feature is very, very hard on the customers."

Then it goes on to say, "Well, would you ever -- would it ever even dawn on you to go to your boss at Apple and say, 'We really don't need to have iPods be able to download playlists that you can navigate through'"?

"Answer: I don't see myself doing that."

"Question: Well, what about, you know, something a little bit less Draconian? 'We can download playlists but let's get rid of the skip buttons'?"

"Answer: No."

Now, you never interviewed Mr. Heller before you wrote your report, gave your deposition, or testified in this case, right?

A. That's correct.

Q. Let's now go to the next page, PX 1076, page 4. This is some testimony from Mr. Stan Ng.

I said to him:

"Question: So, if Mr. Jobs came to you and said, 'Mr. Ng, I want to remove some of the features on here. The device is too complicated,' give me the first feature you'd tell him that should be taken off, or the first functionality.

"Answer: I'd probably say alarms.

"Question: Then he says, 'I want another one. Give me a second one.'

"Answer: Maybe calendar.

"Question: Give me a third one.

"Answer: Maybe contacts.

"Question: Fourth one.

"Answer: Maybe the ability to reorganize the menu.

"Question: Fifth one.

"Answer: Let's see. Probably games.

"Sixth one.

"I don't know. It's getting tougher. People use their iPod for so many different things."

Going over to the next page: "Well, take off something that's not worth anything.

"I'm sorry. Something not working?

"Question: No, not worth anything, some feature that really has no value. There must be some more.

"That's why it's hard, because they all have value, right? I mean, it's hard to say what one person will use every time you remove a feature, which is why we never really consider that much, to remove a feature. Removing a feature means that some people are going to be unhappy, right? And, so, you know, that's really, really a tough choice because, you know, even something like alarms, you know, a small number of people use them, but they'll be really unhappy when you remove it.

"They're all important. I mean, all features are important. Let's see. What else would I remove? Maybe the ability to use it as a hard drive, I guess."

See that?

A. Yes.

Q. And you never interviewed him before you wrote your report, gave your deposition, or testified in this case, correct?

A. I did not interview him. That's correct.

MR. SCHUTZ: Pass the witness.

Thank you, Dr. Ugone.

REDIRECT EXAMINATION OF KEITH UGONE

BY MS. HUNSAKER:

Q. Hi again, Dr. Ugone. Mr. Schutz asked you some questions regarding the E-Data agreement. Do you remember that?

A. Yes, I do.

Q. And that was Exhibit 282A. Do you recall?

A. I don't remember the number, but I'll accept your representation.

Q. Okay.

MS. HUNSAKER: Mr. Barnes, could we bring up 282A, please?

Okay. And if we could focus in on the first paragraph.

BY MS. HUNSAKER:

Q. And in particular the date that Mr. Schutz asked you about. Do you recall that?

A. Yes.

Q. And Mr. Schutz took you through what he said was the E-Data patent expiring in 2003. Do you recall that?

A. Yes.

Q. And the agreement in this case in the instance of E-Data being July 23rd, 2004. Do you recall that?

A. Yes.

Q. So, Dr. Ugone, do you know how far back a patent damages statute goes if you're looking at royalties on a particular patent?
A. I'm not an attorney; but my understanding is that there is a six-year constraint, if that's what you're asking.
Q. Okay. And what is six years before 2004?
A. So, that would be, you know, 1998.
Q. Okay.
MS. HUNSAKER: Let me ask you to pull up, Mr. Barnes, Plaintiff's Exhibit 745.
BY MS. HUNSAKER:
Q. You recall Mr. Schutz asked you about this document, correct?
A. Yes.
Q. And he suggested something about the time of production and whether or not you considered this document. Do you recall that?
A. Yes.
Q. Have you seen documents in your analysis both before and after your expert report that looked like PX 745?
A. Yes.
Q. And in particular, Mr. Schutz pointed you to page 15 of Plaintiff's Exhibit 745. Do you recall that?

A. Yes.
Q. And in particular, he focused you in on a line item that says "licenses." Do you remember that?
A. Yes.
Q. Okay. So, my question, Dr. Ugone, is: Is there anything in this document or that line item in particular that is new or different from information you previously considered in this case?
A. No.
Q. So, I'm going to put on --
MS. HUNSAKER: If I could shift to the Elmo.
BY MS. HUNSAKER:
Q. I don't have extra copies of this exhibit to hand out, but I would refer you to Defendant's Exhibit 261 which was a document cited in your expert report.
A. I'm sorry. Is it in the white notebook or the black notebook?
Q. It's actually in -- it's in no notebook. I'm going to put it on the Elmo for you.
A. Ah, okay.
Q. Okay. So, this is Defendant's Exhibit 261. And does this appear to be a document that you've seen before in connection with your work on this case?
A. Yes. I've seen many documents, and it looks very familiar. It's got the Dulcimer and the P68 and the

authors.
Q. And I'm going to put up page 16 of Defendant's Exhibit 261. So, this was a document you would have considered from Apple's production earlier in the case, perhaps as long as a year or so ago; is that right?
A. Yes, either this document or one similar to it.
Q. Okay. And does this have essentially the same cost analysis as the document in Plaintiff's Exhibit 745 that Mr. Schutz asked you about?
A. I don't have the other document in front of me; but the numbers and the line items look familiar, yes.
Q. Okay.
MS. HUNSAKER: Could we go back to Plaintiff's Exhibit 745, page 15, Mr. Barnes?
BY MS. HUNSAKER:
Q. Now, in questioning you about the license line item for the per-unit cost of the entire iPod in connection with Plaintiff's Exhibit 745, do you recall that Mr. Fadell was also asked about this document when he testified here in front of the ladies and gentlemen of the jury?
A. I do have a recollection of that. I may have to have my memory refreshed as to what the questions were, but I think he was questioned about this.
Q. Okay. Why don't we do that.

MS. HUNSAKER: Mr. Barnes, could you go to page 1089 of the trial testimony? And this is the testimony involving Mr. Fadell -- yes, thank you, Mr. Fadell.

Starting at line 7 and going down to 19.

BY MS. HUNSAKER:

Q. Do you recall Mr. Fadell testifying with respect to Plaintiff's Exhibit 745, page 15, "And, you know, I didn't write this document and I don't know what's meant here and that's what I'm trying to find out. Do you know what's meant here?"

(Reading) Answer: Well, whether you use some -- like I say, the software that came with the processor, those had licensing terms that came along with software so that you would have to pay a licensing fee to gain access. And the reason why you paid a license fee is to be able to -- because they have a set of software engineers working on the software -- allow that. The licensing fee pays for those software engineers to continue working on it and to give us updates and future fixes and bug fixes and those kinds of things.

Did I read that correctly, and do you recall that testimony?

A. Yes, I do recall that testimony.

Q. And, so, is there anything to suggest that the

license line item in Plaintiff's Exhibit 745 has anything to do with a patent license?
A. You can't tell from that line item. It just says "licenses." So, it could be this what I'll call "technology license."
Q. Okay. And, so, speaking of technology license, Mr. Schutz asked you questions regarding the *Affinity* case. Do you recall that?
A. Yes, I do.
Q. And you talked a little bit about this, but what was the technology at issue in the *Affinity* case?
A. The way I describe it is literally taking your iPod and connecting it into your entertainment system of your car so you can listen to the music through the stereos in your car. That's how I describe it.
Q. And was there anything at issue in *Affinity* related to downloadable navigable playlists?
A. Not to my recollection, no.
Q. Was there anything in *Affinity* related to playlists at all?
A. No.
Q. Now, you studied Mr. Nawrocki's expert report in this case; is that right?
A. Yes.
Q. And you were here when Mr. Nawrocki testified?

A. Yes.
Q. Did Mr. Nawrocki rely in his opinions in any way on the Made for iPod licenses?
A. No.
Q. Did he cite them anywhere in his expert report?
A. I don't recall that at all, no.
Q. Did he breathe a word about them in his testimony?
A. Not at -- no. He didn't say anything here, that I recall.
Q. So, there's no indication from Personal Audio's expert that he believed those licenses were relevant in any way to a reasonable royalty in this case; is that correct?
A. That's how I would interpret his silence on the subject matter.
Q. So, let me ask you to turn in your binder to Plaintiff's Exhibit 12. And we're not going to put this up on the screen, but let me ask you to look at paragraph 3 of Plaintiff's Exhibit 12. And this is on the first page of the agreement.
A. Yes.
Q. Now, you mentioned something about a 50-cent royalty; and I believe you testified that your opinion in that case was, in fact, for a lump-sum royalty and not a running royalty; is that correct?

A. Absolutely, yes.
Q. And you were using the Made for iPod to show how much more you get when you purchase certain technology for 50 cents in accordance with that agreement; is that correct?
A. That was one of the things; but I was also trying to show the unreasonableness of the other expert's opinion, given that you could get technology for 50 cents as opposed to just the right to use the teachings of a patent that didn't come with any directions on how to implement.
Q. And, in fact, the Made for iPod licenses don't mention licenses to patents at all; isn't that right?
A. Right. That's why I keep saying "technology license."
Q. And, so, if we look -- if I could redirect your attention back to paragraph 3, with that 50 cents you actually get some hardware; isn't that right?
Could you read into the record what it says in the first two sentences under the heading "royalties"?
A. Under "royalties" it says, "In consideration of the licenses granted in the use license, licensee agrees to pay a royalty of 50 cents per 10-pin or 11-pin power connector purchased for use in a power-only product. Such royalty will be included in the purchase price

licensee pays to Apple's authorized vendor when licensee purchases the 10-pin or 11-pin power connector."

Q. So, in that case the 50-cent royalty is paid in exchange for each piece of hardware as part of that purchase price; is that right?

A. Or at least in conjunction with it, yes.

Q. So, let me ask you to look at the same paragraph of Plaintiff's Exhibit 13, please, Dr. Ugone. And again --

A. I'm sorry. I missed where you were pointing me to.

Q. In Plaintiff's Exhibit 13 I'd like you to look again at paragraph 3. This is on the first page of the exhibit.

A. Yes.

Q. And down under the heading "royalties," if you could again read the first two sentences of that paragraph of Plaintiff's Exhibit 13.

A. So, in Plaintiff's Exhibit 13 under "royalties, Section 3, it says, "In consideration of the licenses granted in the use license, licensee agrees to pay a royalty of 50 cents per remote control chip purchased for use in a remote control product. Such royalty will be included in the purchase price licensee pays to Apple's authorized vendor when licensee purchases the remote

control chip."
Q. And, so, again, the royalty in that case is paid when you purchase -- or when the purchaser under the Made for iPod license actually buys the remote control chip; is that right?
A. Yes. That's my understanding.
Q. And neither the chip nor the 10- or 11-pin adapter, for example, would be included with a bare license, which is what the ladies and gentlemen of the jury are supposed to decide in this case; is that right?
A. That's correct.
Q. So, one more on the Made for iPod exhibits that Mr. Schutz referred to. Could you take a look at Plaintiff's Exhibit 10, please?
A. I'm there.
Q. Okay. And on the first page of that exhibit, paragraph 1 has a series of definitions. Do you see that?
A. Yes, I do.
Q. Okay. And down towards the bottom of the "definitions" section, it says, "licensed technology." Do you see that?
A. I do.
Q. And this is discussing the technology -- some of the technology that is included in Made for iPod

licenses; is that right?
A. That's correct.
Q. Okay. Could you go ahead and read that paragraph, the definition of "licensed technology," in the Made for iPod agreement?
A. Licensed technology, in quotes, "means the iPod accessory protocol interface specification iPod/iPhone/iPad hardware specification, and iPod/iPhone/iPad accessory testing and certification specification as amended by Apple from time to time, and any other documentation, licensed components, devices, digital keys, key sets, source code, object code, or other technology provided by Apple under this iPhone/iPad supplement or under the use license for use by licensee in connection with licensed products that are iPhone/iPod accessories."
Q. And there wasn't anything in that paragraph that referenced patents, was there?
A. No. This is a technology license, which is what I was trying to say before.
Q. So, Dr. Ugone, what form of a license did the jury find for Volkswagen --
THE COURT: Wait, wait, wait. We're not going to get into the details of other cases.
MS. HUNSAKER: Okay. I'll move on, your

Honor.

BY MS. HUNSAKER:

Q. Mr. Schutz asked you a series of questions at the end about taking the accused features out. Do you remember that line of questioning?

A. Yes, I do.

Q. And he took you through all of the trial testimony of all of the Apple witnesses when he asked whether they would take the accused feature of playlists out of the product in this case. Do you recall that?

A. Yes, I do.

Q. And he walked through everything else that Apple's trial witnesses would have taken out instead of the accused feature. Do you recall that?

A. I do.

Q. So, are you aware of any requirement in the damages analysis that a party take out the feature that's accused of infringement?

A. If I understand your question, no.

Q. And, in fact, in coming to your conclusions and reaching your opinions, didn't you assume that the patent was infringed?

A. Yes, I did.

Q. And did the amount of royalty that you believe is appropriate as a reasonable royalty in this case -- did that take into account that Apple would have paid for clearance to use that patented technology?

A. Yes.

Q. And if Apple had clearance to use the patented technology, is there any reason in the world that they would take that feature out?

A. No.

Q. Okay.

MS. HUNSAKER: Pass the witness.

THE COURT: All right. You may step down, sir.

Who is the next witness?

MR. CORDELL: Your Honor, with that, Apple rests.

THE COURT: Let me see lead counsel sidebar.

Chris, I don't need you.

(Sidebar conference conducted off the record with all parties represented.)

THE COURT: All right. Ladies and gentlemen, as you remember last time, when we got to a breaking point, there was a large number of motions I had to hear. That happens again now, but it's a little bit more convenient for you. So, what we're going to do is go ahead and break now so we can stay and take care of all of those motions without you waiting around in the jury room.

There is going to be a little more evidence tomorrow. As I had told you before, the -- well, for one thing, Personal Audio now gets to put on their witness on invalidity. You heard about the invalidity and why the patent is valid or invalid. They get to put that on. So, there will be that rebuttal.

I anticipate that the evidence, which keeps in with my original schedule, will wrap up by or maybe before lunch. At that point I'm going to have probably two or three hours, maybe more, of working with the lawyers on the jury instructions and charge. You may have gathered that I will get lots and lots of objections no matter what I propose. I'll have to deal with all that. And that's their job. There's nothing wrong with that. That's what lawyers are supposed to do. They're supposed to represent their client, and I have to listen to it.

So, what we will do is when we're finished with the evidence and get into that, we're going to go ahead and break for the day. You can go home. And then on Thursday morning we'll start off. We'll have the instructions ready for you. I'll read you the instructions, they'll have their argument, and then you'll retire to deliberate.

So, just for planning purposes, we'll be breaking tomorrow when the evidence finishes; and that will be before lunch, I'm pretty sure. And then we'll come back on Thursday and you'll get the charge, you'll get the argument, and then you'll start to deliberate. You can take as long as you want after that, but there is no reason to try to hold you for two or three hours here and then try to get you started late Wednesday afternoon. I don't think it winds up being any savings of time at all because, as I say, I think this is going to be a good two or three hours of work with counsel and it actually could go longer, given the complexities of the case.

So, even though most of the evidence is over, please keep an open mind. You've still got a couple more witnesses on the issue of invalidity and a little bit of rebuttal on some of the other issues. And you don't have my instructions yet; so, you don't even know what the questions you're going to be asked to answer are yet. So, keep an open mind.

Don't let anybody discuss the case with you. If anybody does, get their name and report it to the CSO. Don't do any research. And I will see you back tomorrow morning at 8:30.

(The jury exits the courtroom, 4:16 p.m.)

THE COURT: Okay. Since the defendant has rested, what motions do we have?

MR. SCHUTZ: Your Honor, Personal Audio moves pursuant to Rule 50 on a number of points, the JMOL motion.

We have prepared a written motion, and I am obviously at the -- whatever the court wants to do. But we've prepared a written motion. It's about 27 pages. We have copies.

As a highlight, we're going to and, in fact, do move on the anticipation defense, the obviousness defense, the marking issue, the written description issue; and then we have a motion relating to lump sum on damages.

I can, you know, walk through all that orally; or I can submit the written motion.

THE COURT: Well, let's start off with written description. I don't think I heard your expert discuss that at all.

MR. SCHUTZ: That's our recollection.

THE COURT: Did I miss -- I'm talking now to Mr. Cordell.

MR. CORDELL: He did a summary of the evidence, your Honor; but he did not specifically address the written description --

THE COURT: Okay. So, given the fact that you've got the burden by clear and convincing evidence, do I really have much choice on that one?

MR. CORDELL: Well, you do. They had their expert go into it; and, so, the record does have some evidence with respect to the written description. I was sort of curious as to why they chose to do that right at the outset of Dr. Almeroth's testimony, but they did bring it up.

We also have, I believe, some --

THE COURT: Okay. So, you're going to rely on their expert who said "Yeah, the written description -- there's plenty of written description here"?

MR. CORDELL: Well, he just kind of walked through it. He didn't quite put it in those terms.

We also had the legal part of written description where we maintained that there was not sufficient written description to support the 112 ¶6 constructions and --

THE COURT: You're talking about the -- wouldn't that really be an argument that I was incorrect in identifying structure?

MR. CORDELL: And that there was not sufficient description to support the structure identified.

THE COURT: Okay. But that's a different --

that's a point of error that the court came up with the wrong claim construction as opposed to the fact issue that would normally -- could sometimes go to the jury, right?

MR. CORDELL: I believe that's correct, your Honor, with one nuance, which is that I want to make sure I preserve my ability to complain about the lack of written description to support the 112 ¶6 --

THE COURT: Okay.

MR. CORDELL: -- even if it's not a pure claim construction issue. We filed a summary judgment motion on it which the court may recall.

THE COURT: Okay. Summary judgment motions don't preserve anything; so, let's get real here. Right now I'm dealing -- and I'll say right now that, of course, you have the right to complain about or posit error based upon my claim construction. I mean, that doesn't upset me even. That's part of what you have to do, and most district judges, when they do a claim construction, can probably think of other ways of doing it; and the higher court is well -- in a good position to make that final decision. So, that's not the problem.

What we're dealing with here now is the improper -- the defense known as "lack of written description" which is, as I understand it, clear and convincing evidence on the -- burden on the defendant and could be submitted to the jury.

MR. CORDELL: We understand that, your Honor. We did not adduce specific evidence from our expert on that issue.

THE COURT: All right. Then I'm going to grant that motion for JMOL. I will note that there is some evidence in the record put on by Mr. Call and by Mr. Almeroth as to written description that would probably have been sufficient to support a jury's failure to find even had defendants put on some evidence. Although, when a party has the burden and they don't put on any evidence, I think almost as a matter of law they lose on JMOL because it's their burden.

This idea in the cases that there must be substantial evidence to support a jury verdict and a party can say, "Well, we didn't put on any evidence at all even though it was our burden but the other side didn't put on any either" I think is a misinterpretation and a problem with the use of the words "substantial evidence" in these various opinions by courts that aren't thinking through that precise issue.

There was not clear and convincing evidence of lack of written description; so, I'll grant that JMOL.

Okay. The other one that comes to mind is this marking issue. Tell me, Mr. Schutz, what your -- the highlights on that one.

MR. SCHUTZ: As I understand the defense, your Honor, it's that there is this product called "SongCatcher" that they claim should have been marked. Here are the facts and why we believe we're entitled to JMOL.

First of all, SongCatcher is not a player. There's been no testimony by anyone in this case on either side mapping any claim of any of the patents-in-suit against SongCatcher, which we would submit is required. So, that's issue Number 1.

THE COURT: Okay. Let me hear the response on that one. I think that's correct. I don't -- while there was some discussion of SongCatcher and I think there was some advertising -- and I can't remember if you got in the one with the little skating penguin or not, but that was one of the exhibits -- when I was going through all of the exhibits, I saw that one.

But even if you got in some advertising and some stuff from the Web saying what a cool product, how does that -- how would that establish that SongCatcher used any of the claims of the patent?

MR. CORDELL: The evidence admittedly, your Honor, was at a very high level. It had to do with things like capturing music, talking about playlists, again very, very high-level evidence. But I would argue that it's consistent with some of the infringement showings that Personal Audio has made in this case.

We had a discussion of the burdens a couple of days ago with respect to the marking defense and I believe there was general agreement that we need to come forward with evidence that, in fact, there was a product and that there were certain rights in the entity making the product and then the burden would shift to the patentee then to show us that, in fact, that entity either didn't have the rights or it didn't make the product.

You know, again I admit freely that we didn't spend a lot of time on it and that our expert did not, in fact, do an element-by-element analysis of SongCatcher up against the '076 or '178 claims.

THE COURT: All right. What's your next point? You had more than one. I think you said that was Point Number 1, Mr. Schutz.

MR. SCHUTZ: Yes, your Honor. The next point is that SongCatcher, even if it had practiced the patents, was not licensed under the patents. And, of course, one of the requirements for the marking defense is that if you have a licensee who is practicing the patent, the licensee must mark the product.

And the evidence in the case is that SongCatcher was a Gotuit product -- and we've got testimony from Mr. Pascarella that we played saying it wasn't licensed. We have testimony, I believe, from either Mr. Call or Mr. Logan on the same point.

So, first, there is no indication that it's covered by any patent claims.

Second, even if it was, they would have to prove then that there was a license in place and it was failure to mark pursuant to the license. So, no license is the next. I've got more, but there's...

THE COURT: What about implied, implied license?

MR. SCHUTZ: I don't believe there is a shred of evidence on that, your Honor. I mean, there isn't a document that grants either an express or an implied license; and I'd --

THE COURT: Well, now, the -- I mean, with all the discussion about how Gotuit was tied in with some of the inventors and was using -- I mean, if we get past your Point 1 -- in other words, we say there is enough evidence to find that SongCatcher did use the patented technology, it's not as though this is one of these companies in some foreign country that's secretly using and nobody knew about it. I mean, Gotuit -- in fact, Gotuit was involved in taking some of the other patented technology. So, why wouldn't there be an implication there?

MR. SCHUTZ: Your Honor, I don't believe the evidence in the case is that Gotuit had any other -- they had other patents from Mr. Logan.

THE COURT: Right.

MR. SCHUTZ: But the patents-in-suit here were not under the control of Gotuit. The best they have is that Gotuit was an exclusive licensing agent. There was a Web site printout with that.

THE COURT: Yeah.

MR. SCHUTZ: It wasn't -- I'm sorry?

THE COURT: Well, if they're allowed to be the licensing agent, I mean, they could license it to themselves.

MR. SCHUTZ: Yeah, but there is no evidence that they did.

THE COURT: Well -- and, of course, if you're a licensing agent, you can't use it?

MR. SCHUTZ: Absolutely not. You just have the ability to grant licenses to others. They've not come forward. And, your Honor, this ties in, I think, with -- you know, it comes back to the issue of they need to map the claims against the product. That's fundamental. Because if we had marked and the claims had not been mapped, we'd be subject to a false marking charge. So, it's either covered by the patent or it's not covered by the patent. That is Step Number 1, and there is no evidence from anybody in this case mapping the claims of the patent as construed by the court to the SongCatcher product.

I would also submit that even if you looked at the SongCatcher product, it's not an audio player that downloads or receives playlists from outside the player. It's a piece of software. It's a jukebox.

THE COURT: And, so, let me ask Apple, then. We had some pretty strong testimony, I thought; and this dealt with Defendant's Exhibit 270, which you started off using to show that there was a tie-in or a connection. But then attached to it at page 19 is the actual assignment from Bernice Logan, as trustee, of six patents and/or applications, none of them tying into the patents-in-suit.

And then we have the testimony of -- actually it's the email from Jim Logan to the Gotuit investors. That's Plaintiff's Exhibit 6 where he's saying -- and this is dated February 9th -- "We have moved away from offering SongCatcher."

So, where is the evidence -- other than Mr. Logan was obviously somewhat involved with Gotuit Media, either the CEO or the president, where is the evidence of the assignment or the right of Gotuit to utilize either one of these patents -- well, actually I don't think it would have been the second one. It would have been the '076 probably, given the dates -- but to use the '076 in the production and marketing or free downloads of SongCatcher?

MR. CORDELL: So, your Honor, the evidence begins with Defendant's Exhibit 115, which the court will recall is a part of the file history of the '076 patent in which Mr. Call identifies Gotuit as the assignee, the real party in interest and the assignee.

If I could have the next page, 2006.

So, your Honor, this, for the record, is Defendant's Exhibit 115 at page 206.

And, so, Mr. Call, in a signed communication to the Patent Office -- this was part of the appeal brief in the '076 file history. He has to, under Patent Office rules, identify for them the real party in interest and assignee. They won't allow you to sort of hide that information because they have conflicts like everybody else. And, so, he does that; and he says --

THE COURT: All right. Give me the date of this. Go to the page where he signs and dates the brief.

MR. CORDELL: I believe it was in 2000. Can you go to the signature?

There we go.

Yes, August 2000, your Honor.

THE COURT: Okay. So, in August of 2000, he says they are the real party in interest; and the patent --

MR. CORDELL: The patent issued I believe in March of 2001.

THE COURT: Right. So, he's got that and then later on we have the actual assignments and so forth and we have the other evidence as to their change, both written and oral.

Let's assume that that's sufficient to raise a fact issue of what was going on in 2000. I mean, the law, I think, is pretty clear you don't have to -- or false marking isn't a defense as to products sold before the patent issues.

MR. CORDELL: That's right. And the window of time we're talking about is actually very narrow. So, I believe the testimony was -- is that Gotuit sort of wrapped up its operations sometime in the middle of 2001 and, so, we're looking at probably a couple of months of overlap between the issuance of the patent in March, 2001, and the cessation of sales by Gotuit.

So, that's the window we're talking about. And, so, the state of the evidence as it sits then is we have this assignment from Mr. Call, or this declaration of assignment from Mr. Call. We also have the Web site listing Gotuit as the exclusive licensing agent in 2001 with Mr. Logan as the CEO.

Later in the prosecution of the '178 patent, the court will recall the spurious assignment that I brought out with Mr. Logan where Gotuit Audio made an assignment of the '178 patent which is in the same chain of title to Gotuit Media.

There is a later assignment that places title to these patents in Personal Audio, LLC; but that is yet further evidence that perhaps the Gotuit entities -- again, it's very difficult to keep them all straight -- did have some rights in this set of patents.

THE COURT: Right. But even if later on they had some rights or thought they had some rights or were running around saying they had some rights, doesn't that have to be tied into some -- as I understand it, SongCatcher was a software -- some download of it?

I mean, the false marking has to involve the distribution or production or downloading or sale or something of that product. And the information we have is the -- in addition to the testimony, the corroborated evidence we have is the email from Mr. Logan dated in February saying "we have" -- not "we're going to" or "we're thinking about" but "we have moved away from offering SongCatcher to consumers directly or through other Web sites. Instead, we're developing an audio product with more breadth."

So, you bring up some things in connection with the '178; but by that time is there any evidence at all of SongCatcher being on the market or distributed in connection with that time period?

MR. CORDELL: Not in the '178, your Honor. I cite that really as evidence that perhaps there was more to the relationship between Gotuit and the patents than we understand. But I will set that aside and focus only on the time period the court is asking about because I do think that is a third inquiry -- I hate to impugn my own position, but I think that is yet another one.

And there was some testimony from the witnesses -- and we can find it in the transcript -- where they talked about a gradual cessation of sales, and I will be happy to provide that to the court if it would be helpful.

And I do admit that we didn't do an element-by-element analysis of the correspondence between

SongCatcher and the claims; but recall, your Honor, that they couldn't give us the source code. They couldn't give us a sample of the product. And that's part of our *laches* prejudice that we would allege in that part of the case, that because they waited so long to bring the suit, things like that were gone by the time this lawsuit actually ensued.

THE COURT: Well, shouldn't I deal with that in *laches*, then?

MR. CORDELL: I believe so.

THE COURT: All right. The case law seems pretty clear that the burden of proving the compliance with 35 USC, Section 287 by either marking or actual notice is on the plaintiff. And we see that in such cases as *Sentry Protection Products versus Eagle Manufacturing*, 400 F.3d 910, 918, Fed Circuit 2005.

The patentee bears the burden of proving compliance by preponderance of the evidence. And that was in the *Nike, Inc., versus Walmart Stores*, 138 F.3d 1437 at 1446, Fed Circuit 1998.

Initially, however, to show that there is -- it should even apply, you can't obviously have people just running in and saying, "Oh, they didn't mark this or that" without showing that maybe they produced the patented article. That's on defendant; and there's a couple of district court cases on that one, *Phillip M. Adams & Associates, LLC, versus Winbond Electrics Corporation*; and that's at 2010 WestLaw 3522097 at 2 to 5 out of the District of Utah on September 8th of 2010, where they said (reading) if the marking statute applies, plaintiff has the burden but finding that the marketing statute did not apply because plaintiff had not licensed the product at issue.

And likewise we have *Unova, Inc. versus Hewlett-Packard*, 2006 WestLaw 5434534 at 1. This is the Central District of California, February 16th, 2006. "The party claiming failure to mark must show that the allegedly nonmarked articles were, in fact, patented articles." In other words, the defendant first has the burden to show. And they were citing the case out of the Eastern District of Louisiana.

So, we have the first problem in that there is no real showing that the SongCatcher utilized or incorporated or made use of the patented technology or any of the particular claims. And, yes, it's true that perhaps somebody could have, had there been source code and so forth or -- done a better job; but I don't recall a real good effort at much of a job at all even based on functionality. So, we've got that problem.

And then there is the question of you would have to either -- either Personal Audio or perhaps Mr. Logan or Gotuit or somebody authorized. And here the law is fairly clear that only the patentee has the authority to grant a license. Such cases as *Lans versus Digital Equipment Corporation*, 252 F.3d 1320 at 1327, Fed Circuit 2001.

Now, there is the possibility of an implied license; but that has to be more than, "Gee, they knew each other." And what we do have in Defendant's Exhibit 270 at page 19, an assignment of patent rights which was dated October 22, 1999, showing a clear assignment from Bernice Logan of the James Logan -- trustee of the James Logan trust, where -- to Gotuit Media, Inc., the assignee, of a list of six patents and applications but none of them being either the application that resulted in the patents-in-suit or the patents-in-suit.

We also have the very clear testimony of Mr. Call who was attorney for the trust saying that no such assignment was ever made. It's hard to prove a negative, but that's pretty clear coming from the attorney.

And then we combine that with the Plaintiff's Trial Exhibit 6, the email from Jim Logan to the Gotuit investors stating at the second page, "As a result, we have moved away from offering SongCatcher to consumers directly or through other Web sites."

I don't recall any evidence of a single instance of a SongCatcher product being downloaded, offered, produced, distributed, or anything else. Even assuming -- we'll get back to the first issue. We'll just assume for sake of argument that yes there is a fact issue or evidence that it incorporated or utilized any of the patented technology or any of the claims. But there's no evidence of it ever being, as far as I could tell, downloaded, offered for free, produced, put out at any time after the patent was actually issued.

Now, this is an odd case in that there was a very long time between the application date and the issuance date. And, yes, there was this SongCatcher thing that evidently was being offered during that interim; but, I mean -- and I'll ask you to refresh my memory, Mr. Cordell; but I don't remember any evidence at all of that being out there after the patent issued.

MR. CORDELL: Your Honor, I'm struggling with the transcript right now, trying to find it. Again, it wasn't the most compelling piece of testimony that we've heard; but I do recall there being some evidence that perhaps there was a Web site where they were agreeing to maintain these units for a period of time after the patent issued, is my memory. But if I could, if I could just get back to the court with a citation, we might be able to resolve this quickly.

THE COURT: Okay. All right. And I'll also note, for example, that Dr. Wicker didn't include SongCatcher in his original report; and that's probably because SongCatcher documents were produced after the close of discovery.

But that wouldn't have stopped Dr. Wicker from bringing it up. I mean, he may not have gotten all the details; but it wasn't in there at all. And I had earlier found that there was not active concealment.

So, I'm just not -- I mean, I don't think a reasonable jury, based on the state of the evidence now, could find that SongCatcher did, in fact --

(Off-the-record discussion between the court and law clerk.)

THE COURT: You may be looking for page 402 of the trial?

MR. CORDELL: Yes, your Honor. I was about to say. Sort of halfway through 401 --

THE COURT: So, they continue to download the metadata which would let them use the software that they already had. But there doesn't seem to be any follow-up on does downloading the metadata somehow result in a production of -- even if we take that as granted, or take that as some kind of fact, what does that show?

MR. CORDELL: I believe, your Honor, that would then be the playlists in the parlance of --

THE COURT: Well, that's the problem is nobody followed it up and said "What do you mean by 'metadata'?" Nobody said, "Oh, metadata, are you talking about the playlist? Are you talking about the playlist and songs?"

All the jury would be -- probably our first question we'd get back from them is "What's metadata?" And I'd have to say, "You'll have to rely on all of the evidence that's in the file" -- or "before you," and that's my -- I guess that's part of my point. I don't think a reasonable jury has the evidence before it to find, one, that the SongCatcher -- the kind of -- well, whatever description we have of it, that SongCatcher did, in fact, use the technology in the claims or the invention and, more importantly, that it was then produced or distributed or put out or licensed to be put out -- especially not licensed -- by anybody after the date of the issuance. And it seems fairly clear that there was no -- if somebody was secretly doing this, it wasn't under some kind of authorization or license. So, I will grant that JMOL.

All right. Those are the two that I guess I had focused on as I was making notes up here going through the trial.

So, your others are...

MR. SCHUTZ: Three others --

THE COURT: You said you had something in writing?

MR. SCHUTZ: Yes. We have something in writing on the anticipation defense --

THE COURT: Well, it might help with an outline, if you can give me a copy of that.

MR. SCHUTZ: Yes, sir.

Your Honor, I will hand up both copies of the lengthy motion and the bullet point talking list.

THE COURT: I presume you're giving copies to opposing counsel.

MR. SCHUTZ: I'm doing that right now, your Honor.

THE COURT: (Perusing documents.)

All right. I'm going to reserve my ruling on the anticipation.

I'll reserve my ruling on the obviousness.

All right. Am I to take it that your issues are set out in this -- well, actually they're titled the exact same thing.

MR. SCHUTZ: I'm sorry?

THE COURT: The two titles of what you've given me -- they have the exact same title -- I mean, they're exactly the same but one is long and one is short. So, I will allow you the filing of the short one. We will throw away the long one by the same name as duplicative -- no, you don't want that. They seem to have the same title. You need some way to distinguish the two of them.

MR. CORDELL: We have no objection to that decision, your Honor.

THE COURT: He hasn't objected to it either.

MR. CORDELL: Looks like we're all done.

MR. SCHUTZ: Yes, your Honor. I'm sorry. I was working off a different -- I'm sorry. I had a different cheat sheet. But they both have the same title. One is long, and one is short.

THE COURT: Okay. All right. Well, let me ask this: Does the long one just give argument as to what's in the short one, or does the short one cover all of the issues?

MR. SCHUTZ: The short one covers all of the issues, your Honor, I think sufficient to preserve them for appeal.

THE COURT: All right.

MR. SCHUTZ: There are more detailed arguments in the long one.

THE COURT: Okay. Well, let me ask you this: You talk about the Federal Circuit has required evidence to support a lump-sum award. Do you have a case that says that although almost every businessperson -- and surely every economist who understands damages -- would be aware of the possibility of lump sum and would be aware of the possibility of running royalty and perhaps aware of combinations thereof but just because no one has ever used one on this brand-new technology -- which is your position, it's absolutely brand-new; so, no one could have ever had one on yours -- thus there can be no damages? That's kind of the argument they were trying to use.

MR. SCHUTZ: Well, the argument --

THE COURT: That works both ways. I mean, it would seem to me that on the most cutting-edge technology, which is what you're claiming you've got, there would be no licenses at all because it's so new and cutting-edge and thus no damages could be awarded. That's not what the statute says.

MR. SCHUTZ: No, your Honor. It's that the form of the license is -- this motion is directed to the form of the license. And specifically we think that -- and this motion is judgment as a matter of law that the form of the license is -- should be --

THE COURT: Well, let me flip it back on you. Show me the license where this brand-new, cutting-edge technology was licensed for a running royalty.

MR. SCHUTZ: I can't do that, your Honor.

THE COURT: Isn't that kind of the whole argument? You can't come up with one on running royalty. They can't come up with one on lump sum. The statute says damages no less than a reasonable royalty. And, so, what? I grant their JMOL saying "No, no evidence of running royalty" and then grant you JMOL, "No" -- I mean, where does that leave you? You get zero?

MR. SCHUTZ: Well, I don't think you can do that.

THE COURT: Well --

MR. CORDELL: Not so fast. Not so fast.

THE COURT: He's jumping up. He wants it.

MR. SCHUTZ: They'd take that deal, judge; but I think the statute isn't --

THE COURT: Isn't that -- I mean, it may be something that the higher court -- this is the chance they get to face it head-on. But that can't be the be-all and end-all that there is just a comparable license because if it's new technology, almost by definition maybe it hasn't been licensed yet.

MR. SCHUTZ: Well, let me put -- before I do, I've just been reminded and I want to make sure the record is clear on this. On the two documents we gave you, the short version isn't as explicit as the long version on our nonobviousness argument on all claims. I want to make it clear that we believe there has been a failure of proof in their nonobviousness defense on all the asserted claims.

THE COURT: Right. And I'm going to reserve my ruling on nonobviousness.

MR. SCHUTZ: Okay.

THE COURT: And I'm going to reserve my ruling on anticipation.

MR. SCHUTZ: Thank you.

So, let me put a fine point on the lump-sum issue. What Dr. Ugone is asking for and advocating is a lump sum for a freedom-to-operate license, a license that extends beyond the products that have been accused in this case. And, of course, we know exactly why Apple wants that. They want to get that as a jury verdict and then argue that there would be no second trial in this case. I mean, they -- and no future royalties or anything else. It's very transparent what they're trying to do.

I've looked at the cases, the *Lucent* case, the other cases. I don't think there is any support in those cases for this freedom-to-operate license for a lump sum. Those cases that deal with lump sum deal with products-in-suit and accused products. They don't deal with -- I don't believe there is any case law they can point to that says the lump sum extends beyond the products that are actually in issue, in dispute.

And, so, at a minimum, we think we're entitled to JMOL that a freedom-to-operate license is not an appropriate result in this case.

THE COURT: But we're looking at the construct of a negotiation at the time of first infringement. And while you can use the Book of Wisdom, which I don't think either expert talked about -- and I was surprised -- to show actual results and, for that matter, could use the Book of Wisdom to show anticipated future results -- no one brought that in. But that doesn't mean that there isn't some evidence -- namely, his opinion, for what it's worth to the jury, and the evidence that he cited as to "Here's what the parties would have agreed on."

I mean, it's a -- and, of course, I have to decide future anyway. And, so, maybe that would be the one where there would be a lump sum and I would decide future -- that raises an interesting point.

MR. SCHUTZ: Your Honor --

THE COURT: But the problem is, I think -- is that you're saying that because they didn't show more in the future, then their use of *Georgia-Pacific* and the hypothetical negotiation at the time -- basically what you're saying is he didn't use the Book of Wisdom. But that's not required.

MR. SCHUTZ: Well, what I'm saying, your Honor, is that the case law -- *Lucent* is one example. When it talks about lump-sum licenses, it talks about projections for the product being licensed. The only projections in this case appeared in Defendant's Exhibit 42; and it's only for classic 1, classic 2 -- or iPods. There are no projections for any other products that would be encompassed by this freedom-to-operate license; and, therefore, a lump sum that extends beyond the products in dispute here is not appropriate, at a minimum.

THE COURT: Well, but aren't you really attacking him for not using -- not having a high enough number, which you could have dealt with by your expert saying, "Okay, if you're going to go lump sum, remember you've got to cover all of this; so, your lump sum ought to be at least $88 million or a hundred million" or something like that?

MR. SCHUTZ: Well, on this particular issue for lump sum, they're the proponents of that, your Honor.

THE COURT: Sure.

MR. SCHUTZ: And I think the burden is on them to show that they've met the requirements to get a lump sum, and I would submit that the requirements to get a lump sum are first constrained or limited in that a lump sum only applies to the products at issue. It does not apply beyond the products that are specifically at issue. So, if there is a lump sum awarded in this case, it's not --

THE COURT: Now, what case do you have for that proposition?

MR. SCHUTZ: Well, your Honor, there is no case that is -- like I said, the burden is on them; and I'm --

THE COURT: Okay. I don't mind you raising -- I mean, obviously this is something that will have to be settled; so, I don't mind you raising the issue. But in terms of JMOL, I would normally be going based on cases that have been decided.

Will you agree with me that a higher court has not yet set out the issue in the clarity or detail that you're -- in other words, there hasn't been a case saying yes, you must only limit it to the product -- the accused products?

MR. SCHUTZ: I think that if you look at the fair -- a fair reading of the Federal Circuit cases is that lump sum is limited, in fact, to the accused products. I don't think there is anything you can read out of there that argues it extends beyond the accused products to --

THE COURT: Well, wouldn't it be actually more fair to say they really haven't hit the precise issue on the head? You can fairly read it this way or fairly read it that way, but -- and here, since we've got a second trial coming up, we know there's more out there; but I haven't seen the case where the higher court really dealt with it.

Because I've carved out a second group of products.

MR. SCHUTZ: Right. But they're trying to stop that second -- surely if we win, they're trying to stop that from happening by getting a freedom-to-operate license.

THE COURT: Well, that's what a lump sum is. They've come up with a fancy name.

MR. SCHUTZ: Well, but I would argue, your Honor, that a lump-sum license does not necessarily extend to freedom to operate. Lump-sum licenses could be for very defined things. It could be a lump-sum license for Apple to produce iPods under these patents, and it doesn't extend beyond iPods. In other words, it doesn't extend to iPhones, iPads, or anything else.

And there has been no evidence or projections for these other products that they are going to argue, if they succeed on this, are swept in by this lump-sum license.

THE COURT: And that's why they would look at the other *Georgia-Pacific* factors. I mean, there's 15 of them there; and you're pointing to one. They've got others saying, well, we'd look at the possible -- well, I don't have them all in front of me -- but other possible uses, the size of the company, the chance of development. I mean --

Okay. All right. I am going to deny JMOL on lump sum, I mean, unless you're going to ask to reopen at this point based on some flaw that's just been pointed out.

MR. CORDELL: No, your Honor.

THE COURT: Okay. I'm going to deny the motion for JMOL on lump sum. I believe that the current case law does allow lump-sum-type calculations. I don't believe that it requires specific evidence of future projections. That's one of the factors that could be used, especially by, I guess, a plaintiff to heighten the amount of the lump sum or by a defendant to say everyone knew this -- and I've actually had this in one patent -- this patent was going to be useless within a couple of years because of new technology coming in; so, it was just a limited amount of time. You could have evidence that way, but it is not required.

There is some evidence of two other lump-sum licenses that obviously there is going to have to be some examination of how comparable they are by the jury and to take into consideration the -- I guess "rigorous" would be a good word -- cross-examination that was done by yourself.

And I may at the end of this, depending on what the -- because I'm sure you're likely to renew these. Depending on what verdict the jury comes back with, I may have to supplement this with a written order because you are raising some issues that don't appear to have been addressed. And, so, I may -- well, if that's what the verdict is and you renew your motion, then I will fill this in with written reasons setting them out because the law is, I don't think, quite as clear on that.

Okay. So, that takes care of your JMOL, right?

MR. SCHUTZ: Yes, your Honor.

THE COURT: All right. Then anything else to be taken up outside the presence of the jury before we start, from Personal Audio's point of view?

MR. MORTON: Just one thing, your Honor.

THE COURT: Okay.

MR. MORTON: I just wanted to ask real briefly about the bench trial.

THE COURT: Okay.

MR. MORTON: Is that likely to occur now, are you thinking, on Thursday after the --

THE COURT: Yes.

MR. MORTON: Okay. And for that -- I don't know if we have an agreement on this. We haven't talked about it yet. But I would like to, if I could, get an identification of the exhibits that will be used in the bench trial.

THE COURT: Okay. What I have is what Ms. Mullendore and Ms. Tse have prepared for me, and also Ms. Frampton. I haven't seen the exhibits yet either. So, if you can agree on that, it would probably make it go quicker. In fact, if you can get that to me so I can be looking at them in all my spare time, it would go much quicker.

MR. MORTON: Thank you, your Honor.

THE COURT: Okay. Counsel?

MR. CORDELL: I can raise two issues.

THE COURT: Sure.

MR. CORDELL: The first is: What's the court's preference on the length of time for closing?

THE COURT: Short.

MR. CORDELL: Okay. Let me beg --

THE COURT: How much time do you think you're going to need?

I mean, keep in mind what's going to happen -- and both sides need to think about this -- is it's probably going to take me about 40 minutes to read that charge, maybe a little less, maybe a few minutes longer. If we start butting up into lunchtime with the arguments after all that, it starts getting -- the jury is ignoring you. I mean, that's just the way it is. In fact, after a certain period of time, we all know that it takes too long. So, what do you think?

MR. CORDELL: If it were just me, your Honor, I would say an hour.

MR. SCHUTZ: I don't think we need an hour, judge. I think that -- I think an hour is too long given the circumstances. I thought 45 minutes.

THE COURT: Well, what if we make it 50 minutes a side and that way -- I actually may be hurting defendant by giving you as long as 50 minutes because at least his gets broken up a little bit, but that's -- you know, you're well skilled and you can figure out how much of that you have to use -- or want to use.

What I'll probably do is take a break after I give them my instructions and then let you start and then I've got to figure -- 50 and 50 -- we may not break. We may just let you argue it out and then send them on back.

MR. SCHUTZ: It's your Honor's practice that the plaintiff can reserve some time for --

THE COURT: Oh, yes. Yes. You just need to make a full opening.

MR. SCHUTZ: Right.

MR. CORDELL: Is there any time limit on how much can be reserved for the final close?

THE COURT: Not really, as long as he makes a full opening. He has to address all of the issues. He can't ambush you by not addressing them and then bringing it up and you haven't had a chance to rebut.

MR. CORDELL: I appreciate that, your Honor.

The other issue I wanted to raise has to do with Mr. Schutz's -- and actually it's one of the -- it's still on Mr. Schutz's computer. He has some quotes here from Mr. Ng where he pressed several witnesses on why they haven't taken a feature out, why can't you take a feature out. We heard that over and over again.

The response to that, your Honor, is that Apple didn't know about these patents until they were sued in 2009. Now, that gets directly into the *laches* issue; but Mr. Schutz has persisted and he pressed and he pressed Dr. Ugone on that same issue. So, I believe he's opened the door to that argument. He has --

THE COURT: Well, I mean, I think that's a fair -- we haven't heard the invalidity argument, but I'm -- I don't want to try to teach lawyers how to do things, but I'll mention it anyway because it's pretty -- "obvious" is a bad word to use in patent cases.

You almost can guess that what we're going to hear is secondary considerations of nonobviousness and one of them's going to be the importance and so forth of the -- I mean, there's going to be some discussion about how important these features were and one of the indications of how important it is -- I'm sorry to be giving away all of your secrets, Mr. Schutz. But, I mean, obviously he's going to be coming with, "You know how important this is. They wouldn't take this one out."

And you come back with "Of course they're not taking it out. It makes customers mad."

I don't see that was opening anything up. That was just -- the first time he said it, I thought, okay, you know what he's coming with.

MR. CORDELL: But there's another aspect of this, your Honor. They can't suggest that we've known about this for ten years and haven't taken the feature out.

THE COURT: Well, I don't think that's the suggestion. And if I hear that, then yes, it would be different. I mean, I'm taking it as "You know how important this feature is. They won't take it out. And I kept trying to ask them; and even when I asked them, they would say, 'Well, take out games. Take out alarms. Take out calendars.' But they aren't taking out this because this is the guts."

I mean, I don't want to give Mr. Schutz's argument but --

MR. CORDELL: I think we've already heard that, your Honor; but again, the persistence with which he addressed it with the witnesses made it sound like this was, you know, Mr. Jobs visiting several of the witnesses or at least one of the witnesses asking, "What should I take out?" I mean, it makes it sound like this is a long, protracted kind of exercise. It's almost a post-remedial measure, just kind of, objection. That was the other one that was left to mind.

THE COURT: And, so, your objection is or your wishing to open is what?

MR. CORDELL: Correct. My request is to be relieved of the motion *in limine* with respect to not mentioning the time delay because I should be able to explain to the jury that Apple found out about this in 2009 and that's why these features haven't been addressed. It's an additional argument to the one I will also make which is they don't infringe. Therefore, there is no reason to take them out. But I should be able to tell the jury, you know, Mr. Schutz --

THE COURT: You want to tell the jury that the reason these weren't taken out is because you didn't know about it?

MR. CORDELL: Not quite in those words but -- but the point is that I don't -- I want to dispel any notion that they have that we've been sitting around doing nothing, that we haven't looked at it, that we haven't studied it.

THE COURT: Mr. Schutz?

MR. SCHUTZ: I just want some free rein in my rebuttal, judge, if he says that. I mean, we absolutely do not concede that they did not know. Absolutely not. The patent became public in 2001. They rushed this project. They didn't do a freedom-to-operate opinion. I mean, he wants to open that door in his closing, I just want to be able to waltz in.

THE COURT: You really want to make a remark like, "Well, if we had just known, we could have done something about it"?

MR. CORDELL: No. I certainly wouldn't put it that way, your Honor; however, it just -- again, it will depend a little bit on what he says tomorrow, I suppose.

THE COURT: Okay. I think -- and this is basically under 403 analysis. First of all, I'm going to decide *laches* anyway.

But the danger of confusion of the issues of getting into -- and it's almost a "be careful what you pray for" kind of a thing.

I have not heard and did not get the implication from the very first time they said that, that Mr. Schutz was going for anything other than this is clearly key, important parts of the technology; and that backs up his damages analysis.

I have not heard the implication that they've known about this all along and they've just been sitting around not doing it and it's deliberate or willful or anything like that.

Now, obviously if he says that in his closing and you want to talk about it, then bring it up. But I really think opening that door gets us into a much worse can of worms than we are now.

MR. CORDELL: Thank you, your Honor.

And then one just little last point -- and I promised you that that last one was my last point. With the court's ruling on the SongCatcher product, do we have any need for Mr. Call to testify during the rebuttal case?

THE COURT: I don't know.

MR. SCHUTZ: I think not now because that's what we were going to bring him to testify about.

THE COURT: SongCatcher?

MR. SCHUTZ: About the title issue. I mean, it was going to be pretty brief. It was he made a mistake in the -- so, the rebuttal case just got shorter by a little bit.

MR. CORDELL: Thank you, your Honor.

THE COURT: Do you want me to pull my ruling back and --

MR. SCHUTZ: No. No. I said we don't need it now.

THE COURT: Okay. All right. Then all we've got tomorrow then, I guess, is --

MR. SCHUTZ: Dr. Almeroth.

THE COURT: -- Dr. Almeroth. Then we're going to have plenty of time to go over the jury charge and so forth tomorrow.

Okay.

(Off-the-record discussion between the court and courtroom deputy.)

THE COURT: I'm going to have the jury called and tell them they can be here at 9:00 instead of 8:30 because we've only got the one witness. There is no point in getting in real, real early, especially if we've got rainstorms going on. My guess is this is going to be over within two hours.

MR. SCHUTZ: Certainly by noon, I would think.

MR. HOLDREITH: I anticipate about an hour --

THE COURT: Well, if it's noon, they may want lunch.

MR. SCHUTZ: Ah. We're buying lunch, aren't we? We're more than happy to continue buying lunch.

THE COURT: Okay. Let's see what time we get over. I mean, if it's close to lunch, we need to at least offer it to them. I don't know how far some of them are traveling.

(Off-the-record discussion between the court and courtroom deputy.)

THE COURT: All right. We'll just have to deal with that to see how it's going. I don't think that part needs to be on the record, though. I mean, we don't need to keep the court reporter here while we're talking about those kind of things.

MR. SCHUTZ: Just one other thing, your Honor. I think that the -- because I know your Honor may be doing some preparation for this. I believe the equitable case has been narrowed quite a bit on the inequitable conduct charge. I think the disclosure is just related to DAD now, failure to disclose DAD is the allegation.

MR. CORDELL: We had some discussion over the weekend, your Honor, and what we've told the plaintiff is that we're going to focus on two things in the equitable case, the *laches* defense in all its glory and then for inequitable conduct we're really focusing on the DAD manual and the failure to disclose the DAD manual properly to the Patent Office.

THE COURT: And evidently what they disclosed was the DAD brochure instead of the DAD manual?

MR. CORDELL: That's right. And there was this sort of stillborn effort to put the DAD manual in front of the Patent Office; but the patent examiner said, "We're not -- you're too late. You've got to do it under the rules" and they chose not to follow the rules.

MR. SCHUTZ: We disagree with that and, of course, that will be part of the evidence, your Honor.

THE COURT: Okay. All right. Then we're off the record --

MR. CORDELL: Your Honor, Ms. Mullendore has something.

LAW CLERK: When you say "*laches*," do you mean *laches* and prosecution *laches* or just *laches laches*?

MR. CORDELL: I think we mean all of *laches*, and prosecution *laches* is one of the parts of that.

LAW CLERK: Okay. Thank you.

THE COURT: All right. Now we are off the record. You can wrap up your part of it.

(Proceedings adjourned, 5:17 p.m.)

COURT REPORTER'S CERTIFICATION

I HEREBY CERTIFY THAT ON THIS DATE, JULY 5, 2011, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS.

Christina Bickham

CHRISTINA L. BICKHAM, CRR, RMR

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